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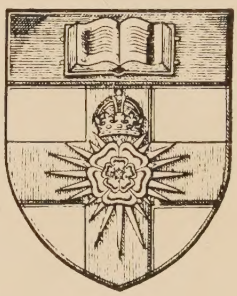

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re GILCHRIST.

C. A.
1906
Nov. 12.

Lunacy—Inquisition—Traverse of Inquisition—Right of Lunatic to traverse—Discretion of Judge in Lunacy—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *s.* 101.

Upon the petition, under s. 101 of the Lunacy Act, 1890, of a person found by inquisition to be of unsound mind for leave to traverse the inquisition :—

Held, that leave to traverse the inquisition was a matter of right, but that this does not prevent the judge in lunacy from exercising such a control in the matter as may be necessary for the protection of the person and estate of the alleged lunatic by satisfying himself (e.g., by a personal interview) that the application is bona fide, and that the alleged lunatic is competent to exercise an act of volition upon the subject.

In re Cumming, (1852) 1 D. M. & G. 537, applied.

PETITION.

This was an application by a person found by inquisition to be of unsound mind for leave to traverse the said inquisition.

By an order for inquiry of January 16, 1906, the Masters in Lunacy were directed to inquire concerning the alleged lunacy of the petitioner.

In pursuance of this order an inquisition was held in March, 1906, before one of the Masters in Lunacy and a special jury of twenty-three, when, after a hearing lasting three days, the majority of the jury found that the petitioner was a person of unsound mind and incapable of managing himself and his affairs.

The lunatic subsequently applied by petition for leave to traverse the said inquisition, and that in the meantime all further proceedings before the Master might be stayed.

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The main grounds alleged in the petition as reasons why a traverse should be granted were misdirection of the jury by the Master and that the verdict of the majority was against the weight of evidence.

The petition came before one of the Lords Justices, who adjourned it into Court for argument.

Rawlinson, K.C., and *Eustace Smith*, for the petitioner. Assuming that the application is bona fide (as this is), and that the lunatic is competent to exercise an act of volition upon the subject, leave to traverse the inquisition under the Lunacy Act, 1890, s. 101, is a matter of right, and in this event it will not be necessary to go into the question of evidence raised in the petition.

It has been decided under 6 Geo. 4, c. 53, s. 1, in *In re Cumming* (1) that leave to traverse the inquisition is a matter of right, subject to the Court being satisfied that the lunatic knows what he is doing and is desirous that the traverse shall issue. The wording of the Lunacy Act, 1890, s. 101, is very similar to the enactment in 6 Geo. 4, c. 53, s. 1; and s. 2 of that Act and s. 102 of the Act of 1890 both speak of a "right to traverse." There is evidence of the petitioner's desire to traverse, and that he knows what he is doing, and on the authority of *In re Cumming* (1) we submit that a traverse should be allowed. The bona fides of the application is admitted.

Grimwood Mears, for the family of the lunatic, the petitioners on the inquiry before the Master.

[VAUGHAN WILLIAMS L.J. Surely these applications are not usually contested, except possibly by the Crown?]

Those whom I represent have been served with this petition in accordance with the practice in the Lunacy Office. In *In re Cumming* (1) the heir and next of kin appear to have been represented by counsel.

[VAUGHAN WILLIAMS L.J. I am informed that it is the practice to serve the heir and next of kin in a case of this kind, and it would seem, therefore, that you have a right to appear on this application.]

(1) 1 D. M. & G. 537.

The application is not strictly opposed, but the Court has a discretion whether it will grant a traverse, a discretion that must be carefully exercised. Under sub-s. 2 of s. 101 of the Lunacy Act, 1890, the judge has to "hear and determine" the application: Pope on Lunacy, 2nd ed. p. 78. The protection of the estate of the lunatic, the hopelessness of the application, the probable waste of money which can ill be spared, have to be considered.

[VAUGHAN WILLIAMS L.J. referred to the observations of Lord Cottenham in *In re Bridge* (1) as a complete answer to this part of the argument.]

The Court ought to satisfy itself by a personal interview that the lunatic knows what he is doing and is desirous. Application for a supersedeas would be much less expensive than a trial all over again before another jury and a judge of the High Court.

VAUGHAN WILLIAMS L.J. We are bound by the authority of *In re Cumming* (2), which not only decides that the lunatic's right to traverse is a real right, but is also a clear decision as to the kind of discretion the Lord Chancellor, or those who are for this purpose standing in his place, exercise in a matter of this kind. The result is that although the Lord Chancellor may have a discretion to refuse an application of this kind in a case where he is satisfied that the petition is presented by a person who is incapable of exercising a volition in the matter, or of understanding what he is asking for (there may be other cases in which we have a discretion other than in the particular instance that I have just mentioned), still at the same time the general conclusion is that the traverse, save in those exceptional cases where the Lord Chancellor has a right to refuse to allow the petition, is a matter of right. We cannot decide now whether we will allow this traverse to be taken by Mr. Gilchrist, because, as I understand the decisions and the practice, we have to see him personally first, and that we shall proceed to do. If Mr. Gilchrist should choose to take the course suggested of applying for a supersedeas, in one sense we should be very glad —that is to say, one would be very glad that a course should be

(1) (1841) Cr. & Ph. 338, 347. (2) 1 D. M. & G. 537.

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taken which would save Mr. Gilchrist himself from the excitement that naturally would attend a trial before a judge and jury in the event of our granting this petition. Of course, a supersedeas would not be allowed, however much the family might support the application, unless we were really of opinion that the case was one in which the mental condition had so improved that it would be right to grant a supersedeas. I think that is all we have to do now; we shall see Mr. Gilchrist, and give our formal decision whether we will grant this application after we have seen him.

FLETCHER MOULTON L.J. I am of the same opinion.

BUCKLEY L.J. I agree.

After a personal interview with the petitioner on a subsequent day by one of the Lords Justices, formal leave to traverse the said inquisition was granted.

Solicitors: *J. E. Churchill; W. O. Vizard.*

W. C. D.

PEEL *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

C. A. 1906 — *Nov.* 19.

[1905 P. 2500.]

Company—Railway—Powers of Directors—Application of Company's Funds—Circulars to Shareholders—Influencing Votes—Payments for Proxy Papers and Stamps—Ultra vires.

A controversy had been going on for some years between the directors of a railway company and a body of shareholders with reference to questions of policy affecting the management of the company: previously to the half-yearly general meetings called for February and August, 1905, the directors sent to each shareholder a circular setting out the facts and the views of the directors and asking the support of the shareholders at the meeting; with this was enclosed a stamped proxy paper containing the names of three of the directors as proxies, with a stamped cover for return. The expenses of printing, posting, and stamping these documents was paid for out of the funds of the company. Officers and servants of the company had also been directed to call upon some of the shareholders with a view to obtaining their votes for the directors.

In an action by the shareholders to restrain the company and the directors from using the funds of the company in paying expenses thus incurred:—

Held (reversing the decision of Warrington J.), that it was the duty of the directors to inform the shareholders of the facts, of their policy, and the reasons why they considered that this policy should be maintained and supported by the shareholders, and that they were justified in trying to influence and secure votes for this purpose, and, accordingly, that expenses which had been bona fide incurred in the interest of the company were properly payable out of the funds of the company.

Studdert v. *Grosvenor*, (1886) 33 Ch. D. 528, overruled on this point.

Pickering v. *Stephenson*, (1872) L. R. 14 Eq. 322, explained.

This was an action by shareholders against a railway company and its directors, which raised the question whether the expenses incurred in sending out proxies and circulars, with a view to influence the votes of stockholders in favour of a policy advocated by the directors, are properly payable out of the funds of the company. The facts, which were admitted, were shortly as follows:—

In October, 1901, a controversy began between certain large stockholders, represented by the plaintiffs, and the directors

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with reference to the management of the affairs of the company, the points advocated by the plaintiffs being—(1.) a conference of all railway chairmen for the purpose of discussing questions of railway policy and co-operation between railways; (2.) handling of traffic by means of larger waggons; and (3.) a more elaborate system of statistics prepared on what was known as "the ton a mile" system. The directors, acting bona fide and to the best of their judgment, supported their own policy and did what they could to counteract the policy advocated by the plaintiffs; the plaintiffs advocated their policy, and the questions thus raised were discussed and voted upon at several half-yearly general meetings of the company.

Shortly before the half-yearly general meeting called for February, 1905, the directors, having ascertained that the plaintiffs intended to propose at that meeting that the system of accounts hitherto kept by the company should be altered by adopting the ton a mile system, sent out a circular, signed by the chairman, to all the stockholders, enclosing a report of the proceedings at the half-yearly general meeting of February, 1903 (when this question had been raised and negatived by a large majority), also stamped proxy papers for use at the meeting with the names of the chairman and two directors as the proposed proxies printed thereon, and a stamped envelope for the return of these proxies when signed: the presence of the stockholders at the meeting was urged, and, failing that, a return of the proxies duly signed in time for the meeting was requested. Shortly after the sending out of this circular, the secretary of the company sent out a copy of the circular and enclosures to certain of the stockholders who had not sent proxies in response to former circulars. Some of the district goods managers and traffic superintendents were also instructed to canvass, and obtain proxies for the meeting from, stockholders residing in their respective districts.

Shortly before the half-yearly general meeting called for August, 1905, the directors sent out another letter signed by the chairman to all the stockholders, with stamped proxy papers with the names of the chairman and two of the directors printed thereon, with a request for the return in the stamped cover enclosed of such

proxies when signed by those stockholders who could not attend the meeting in person.

The expenses thus incurred were paid for out of the funds of the company, being charged in the accounts against gross income; the accounts were passed by a very large majority of stockholders present at the meetings.

In December, 1905, the plaintiffs commenced this action on behalf of themselves and all other the stock or share holders in the defendant company other than those who were defendants, or who were represented by the defendant Ernest Moon, against the company, the directors and Ernest Moon (who had been appointed by an order of February 9, 1906, to defend on behalf of all stockholders who were opposed to the views of the plaintiffs), and claimed an injunction to restrain the company and the directors from using the funds or property of the company in paying for :

(*a*) The printing or sending out any proxy papers for use at any meeting of the company with the names of the proposed proxies thereon or any other proxy papers, circulars, or letters, calculated to obtain for the directors, or otherwise to influence, the votes of stock or share holders of the company at any meeting of the company ; or

(*b*) Any services rendered or time spent or expenses incurred by any persons (whether or not officers or servants of the company) in seeking to obtain for the directors, or otherwise to influence, such votes as aforesaid.

It was admitted that the directors were not in any way acting in their own interests or for the purpose of procuring their own re-election, but solely in the interests of the company as they understood them.

Warrington J. on July, 13, 1906, considering the case covered by the decision of Kay J. in *Studdert* v. *Grosvenor* (1), and without expressing any opinion of his own, granted an injunction practically in the terms of the plaintiffs' claim, but suspended its operation pending an appeal, the directors undertaking in the meantime that if they spent any of the funds of the company on

(1) 33 Ch. D. 528.

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similar objects they would refund it if the decision of the Court of Appeal should also be against them.

The defendants appealed.

The appeal was heard on November 19, 1906.

Sir R. B. Finlay, K.C., C. A. Russell, K.C., and *Martelli,* for the railway company and the directors. This is really an appeal from the last part of the judgment of Kay J. in *Studdert* v. *Grosvenor.* (1) It is alleged that what the directors have done is ultra vires the company, as well as ultra vires the powers of the directors as defined by the Companies Clauses Act, 1845 (8 & 9 Vict. c. 16), ss. 90 and 91. We contend that what was done was not only within the powers of the directors, but was only their plain duty. Shareholders are very apathetic, and if directors are not to be allowed to explain their policy to all the shareholders and provide them with the means of supporting this policy, the results may be disastrous. The right to send out proxies in blank to everyone is admitted, but the costs of the stamp on the proxy and the stamp for return are objected to, and the fact that the names of the proposed proxy-holders is printed is also objected to as well as the circulars.

[VAUGHAN WILLIAMS L.J. As company judge I have again and again ordered stamped proxies to be sent out. I have directed a meeting to be held, and I have often given directions for the purpose of taking care that the minds of shareholders were not unduly influenced.]

If an injunction of this kind can be obtained, the result will be to put the company at the mercy of any small and energetic body of operators who desire to enforce their own views, because by circularizing the shareholders and sending stamped proxies at their own expense, they may come to a meeting provided with voting power sufficient to carry any resolution, unless the directors can protect the company by letting the shareholders know what is going on, and by asking them to give the directors sufficient voting power to counteract the attempt made on their policy.

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Studdert v. *Grosvenor* (1) misconceives the duties of directors towards their shareholders as to the welfare of the company, and to this extent is wrong. It is lawful, therefore, to circularize the shareholders to influence their votes, and, if so, it follows that it is lawful to make voting easy by sending out stamped proxies with a stamped cover for return, with the names of proxies who will support the directors' policy, ready printed in the proxy form. As to the latter part of the injunction, that is a very small matter, but it falls within the principles applicable to the first part of the injunction. If it is lawful for directors, as one set of officials, to send out circulars conveying information, it is also lawful for the minor officers of the company to convey information and ask shareholders whether they will support the policy of the directors. The company is entitled to the assistance of all its officers.

P. W. Baker-Wilbraham, for the defendant Ernest Moon, adopted this argument:

Sir Edward Carson, K.C., Rowden, K.C., and *Clauson*, for the plaintiffs, the respondents. The basis of this action is that what the directors have done is ultra vires the company; the unanimous vote of the shareholders could not authorize them to do what has been done. The Court cannot go into the merits or demerits of the conduct of either the plaintiffs or defendants; the funds of the company cannot be used for furthering any particular policy. Under s. 76 of the Companies Clauses Act, 1845, a shareholder has a right to vote by proxy, and the company would be in the right to send him one through the post, but the stamp on the proxy and the stamp for its return are expenses the directors have no right to pay, any more than, as Kay J. says in *Studdert* v. *Grosvenor* (1), they can pay for a special train to enable a voter to attend. The stamp on the proxy is a Revenue question; the shareholder ought to pay this himself.

[BUCKLEY L.J. Is not the test this, whether what is done is reasonably necessary to obtain a satisfactory expression of the shareholders' views on a particular question?]

It is not necessary to pay all expenses of voting.

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[VAUGHAN WILLIAMS L.J. You agree that the question is whether a particular act impeached is one which can be reasonably regarded as incidental to or consequential upon those things which the company is authorized to do?]

That might raise very wide questions. It is not reasonably necessary to send proxy papers with the names of the proposed proxies printed thereon. The standing orders of the House of Commons with reference to the consents of proprietors or members of companies in the case of Bills before the House provide that proxies are not to be stamped before being sent out, nor any intimation given as to the person in whose favour the proxy may be granted.

Directors may be entitled to place information before the shareholders by means of circulars, but they are not entitled to circularize the shareholders so as to influence their votes. *Studdert* v. *Grosvenor* (1) is a direct authority in favour of the plaintiffs, an authority that has stood now for twenty years. In *Pickering* v. *Stephenson* (2), upon which *Studdert* v. *Grosvenor* (1) was to some extent founded, Wickens V.-C. laid it down that the funds of the company were not to be employed in paying costs of litigation on a question of internal administration; the directors have no right to use the funds of the company to advance their particular views in the managment of the company. In *Pickering* v. *Stephenson* (2) it was a question of ultra vires.

[BUCKLEY L.J. The latter part of the judgment in *Pickering* v. *Stephenson* (2) was disapproved by Lindley L.J., in *Cullerne* v. *London and Suburban General Permanent Building Society.* (3)]

That was only on the question of not ordering the directors in that case to refund; we do not ask that they should refund: the proposition in the earlier part of the judgment that we rely on is not touched by Lindley L.J. Neither does it affect that part of *Studdert* v. *Grosvenor* (1) on which the plaintiffs rely. These circulars and filled-up proxy papers are mere partizan appeals for votes.

The directors were not entitled to employ the officials of the company in canvassing for votes.

(1) 33 Ch. D. 528. (2) L. R. 14 Eq. 322.
(3) (1890) 25 Q. B. D. 485, 490.

VAUGHAN WILLIAMS L.J., after stating the nature of the action, the facts, and the injunction granted by Warrington J. on the authority of *Studdert* v. *Grosvenor* (1), continued:—The question we have to consider is whether that injunction is right. Sir Edward Carson obviously felt a difficulty in contending that the company, as a company, could only do those acts which are expressly authorized by the special Act of the company, or by the Acts that have to be read with it, and had to admit that the company not only has a right to do those acts which are expressly authorized, but also all such acts as may fairly and reasonably be considered as incidental to or consequential upon the works which are so authorized. But when Sir Edward Carson came to apply this rule to the present case, he was not prepared to say that the cost of printing the proxy papers was not an expense which came reasonably within the rule, and he admitted that this particular expense might be incurred, as well as the cost of stamping these proxy papers in order to post them to the shareholders; but the impeachment of Sir Edward Carson first begins, so far as these proxy papers are concerned, at the fact that the directors sent them out already stamped. It seems almost necessarily to follow from the admissions that have been made on behalf of the plaintiffs that it is incidental to and consequential upon the statutory authority of the railway company to take the proper steps to call a meeting together, and therefore that the proxy papers may be printed and may be posted. But it is said that although it may have been found that it is very difficult to get an effective or representative expression of the views of the shareholders at any meeting, even when the most important questions are going to be discussed, unless you send out the proxy papers stamped, yet for some reason which I confess I do not understand it is a wrongful expenditure of the funds of the railway company to put a stamp on the proxy paper. I can only say that I do not myself understand the reason for drawing the line at that point.

Then comes the question, Is the fact that the directors insert the names of the proxies whom they suggest to those who are minded to vote in favour of the policy of the board a fact that

(1) 33 Ch. D. 528.

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would make the expenses of the issue of these proxy papers, which otherwise would have been lawful, unlawful? And when considering this question it will be convenient at the same moment to consider the question of the issue of circulars, which is also restrained by the order of Warrington J. The question is not whether the directors have the right to issue these circulars, the question is whether they have the duty—a duty which might reasonably involve the issue of these circulars—for unless they have this duty, in my judgment they have no right whatever to issue them. As a board of directors it would not make the slightest difference whether they paid for the cost of printing and posting the circulars out of their own pockets, because they cannot as a board have a right to do anything which is not within the scope of the execution of the duties imposed upon them. Under those circumstances, what have we to ask ourselves about the issue of these circulars? How is the line to be drawn? Is it to be said that the board of directors of a company, whether a railway company or other company, who have had to adopt a particular policy, when that policy is impeached by others (be the number of those who impeach big or small) have not the positive duty to inform the shareholders what have been the reasons for the policy which has been theretofore adopted, and why they think that that policy should be maintained in the future? I cannot myself understand any one having a doubt as to the directors having that duty. They are not to abstain from their duty to give such information to the shareholders of the company as they think may be desirable for them in the interests of the company because of the accident that a certain number of shareholders take the view that the policy theretofore exercised by the directors has been a wrong policy. It is their duty to give information of the facts which they think justify the policy. It is their duty to put forward to the company those reasons which they think justify the policy which the company with their assistance as managers has adopted, and to say to the company, if they think in good faith that it is the best advice, "Do not attend to those people who are circularizing you to set aside the policy of the company up to this date, but on the contrary trust us and leave it to us." If they may do that, may

they not go a step further and say, "If you do trust us, if you do believe the policy which we have adopted is the proper policy, we advise you of this, that the best way of getting that policy continued is to appoint as your proxies the gentlemen we have mentioned in these proxy papers"? I myself cannot understand why the directors should not have that duty which I have spoken of. The necessary result of the opinions I have been expressing is that I must hold that the judgment of Warrington J., and to a certain extent the judgment of Kay J. (afterwards Kay L.J.) in *Studdert* v. *Grosvenor* (1) on which it was based, is wrong, and that is a view that I do take. It would not, however, be respectful or right for me to differ from the view of so great a judge without stating the reasons why I think this part of his judgment was wrong. Nobody with any experience in railway matters can doubt that this part of the judgment in *Studdert* v. *Grosvenor* (1) has by no means been universally acted upon by railway companies since that date, either in respect of the proxies or in respect of the issue of circulars.

I began this judgment by calling attention to the very frank way in which Sir Edward Carson admitted that the company, as a company, had a right to do not only those things which are specially authorized by the Act, but also, without any imputation of ultra vires, to do all such other things as may fairly be regarded as incidental to or consequential upon those things which the Legislature has authorized. The words I have just spoken are a quotation, and not my own, from a judgment of Selborne L.C. in the case of *Attorney-General* v. *Great Eastern Ry. Co.* (2)

What one has to consider here is that there is an attack upon the policy of the railway company. The attack in this particular case happens to be an attack by an association of high-minded gentlemen who only have the interests of the company at heart; but, in the principle that one has to deal with here, one must contemplate the possibility of an attack being made by persons who have not the interests of the company so much at heart—attacks, it may be, by others who have a deeper interest in other and competing undertakings. Under those circumstances I ask myself, Have the directors of the company the right to take steps

(1) 33 Ch. D. 528. (2) (1880) 5 App. Cas. 473, 478.

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that there shall be a full attendance of shareholders at the next meeting? I say it is their positive duty, if they think that there is a serious attack being made upon their policy which is likely to jeopardize the interest of the company in the future, to take care that there is a meeting at which there shall be a full attendance of shareholders. I cannot doubt myself but that, if it is their duty to take care that there are plenty of shareholders present at the meeting, it is also their duty to take care that there are a sufficient number of shareholders put into a position to vote for those who personally are unable to attend the meeting. It is not denied that it is right, under those circumstances, to spend the funds of the company in printing proxy papers. There can be no doubt that it is also their duty to take care that a sufficient statement of the facts which will have to be considered by the shareholders at the coming meeting is also placed before the shareholders. Indeed, the expense of printing the proxy papers and the postage stamps is not in question. The only question is whether the directors have a right to stamp the proxies. All I can say there is that, in my judgment, when once you admit the duty of the board of directors to be of the character which I have described, namely, that of informing and advising the shareholders, I cannot help thinking that, inasmuch as this stamping is not prohibited, it is fairly to be held incidental to and consequential upon the duties of the directors as servants of the company, and by no means ultra vires of the company itself. No questions of this kind were involved in *Studdert* v. *Grosvenor*. (1)

I do not propose to repeat myself upon the subject of the insertion of the names recommended as proxies by the board of directors. It seems to me that that stands or falls with the duty of the directors to advise the shareholders. If they have the duty and right to issue circulars, I cannot myself see how it can be said that they have not also the duty to advise the shareholders how they will best effect the maintenance of the policy which they happen to approve. It is to be remembered with regard to these proxy papers that there is nothing to prevent any one who has received a proxy paper from erasing the name of one proxy and inserting the name of another.

(1) 33 Ch. D. 528.

I think there are very considerable differences between *Studdert* v. *Grosvenor* (1) and the present case, but I do not wish to dwell upon them further, because, if *Studdert* v. *Grosvenor* (1) bears the meaning that counsel for the respondents put upon it here, it is right that I should say that in my opinion it is wrong.

I think this appeal should be allowed with the usual consequences.

Fletcher Moulton L.J. I am of the same opinion. From the facts in this case it is evident that this is in reality an appeal from the latter part of the judgment of Kay J. in *Studdert* v. *Grosvenor*. (1) In that part of his judgment the learned judge dealt with the question of directors sending out blank proxy papers to shareholders, and also with the question of their sending out proxy papers with the names of the proposed proxies filled in. He expressed his view that even blank proxy papers might not be sent out by directors, if stamped or if accompanied by a stamped envelope for returning the signed proxy papers to the directors, for the purpose of being used to vote. I am utterly unable to see any reason why directors should not do this. I can imagine that directors, as managers of the company, may feel it very important that there should be a large representation, either in the form of stockholders present at the meeting or stockholders who have taken steps to express their opinion by means of proxies in the hands of persons present at the meeting, and I cannot see any possible reason why, if the directors think it good for the corporation, they should not let the corporation bear the cost of all the necessary facilities for voting by proxy just as they do for voting personally.

But that is not the real point at issue in this case. The true issue arises from the fact that these proxy papers were filled up with the names of persons ready to occupy the position of proxy-holders and officiate as the proxy of the shareholder in question, and that these persons were, and were conceded to be, persons who would use the proxy in a particular way, namely, in favour of that view of policy which as a body the directors themselves held. It is not denied that the proxy

(1) 33 Ch. D. 528.

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paper so sent out was capable of being used for another purpose by substituting the name of someone who would consent to be a proxy-holder and use it in a different way. But it is suggested that the insertion of these names was calculated to influence the vote of the shareholder. On this account it is, as has been said by the President of the Court, convenient to consider it together with the circulars which were drawn up directly for the purpose of influencing the stockholders to vote in favour of the policy which the directors thought the best for the corporation. This brings us face to face with the issue, Aye or No, is it within the duty of directors to attempt to influence the minds of stockholders in favour of one policy or another? because if it is within their duty to do so they clearly, I think, have the right to do it at the expense of the corporation.

Now, what is the position of a director? A director is chosen by the stockholders as a manager of the undertaking. As such manager he is brought into intimate connection with the working of the corporation, and acquires knowledge of its working and of its position which no ordinary stockholder can get. Assume that he learns that it is proposed to advise the stockholders to adopt a policy which his knowledge of the business and his investigations lead him to think will be disastrous to the corporation. I unhesitatingly say that, if he thinks there is any danger of the corporation taking a step which in his view would be injurious to the corporation, it is his duty to put his knowledge at the service of the individual corporators, and also to give them the advice which that knowledge leads him to think is best for the prosperity of the corporation. Let us test it by looking for a moment at the case of a firm consisting of several partners carrying on business as a mining company working mines in a foreign land, over which mines a manager has been appointed. He hears that persons have suggested to the partners that they should purchase neighbouring lands in order to increase the area of their mining operations, and he writes a letter to each of the partners saying, "For such and such reasons I think it would be unwise for you to do so (or wise for you to do it only in certain directions) and I advise you strongly to leave the matter in my hands, because, knowing the ground thoroughly well and

being on the spot, I shall be able to manage it better than you." Who can doubt that it would be within his duty as manager to write such a letter, and must he write that letter and send it at his own cost simply because the advice which he gives to his employers is, "Leave the matter in my hands"? That analogy seems to me to take us the whole way. I am satisfied that in putting information before the stockholders and in advising them what course to pursue, the directors are doing their duty, and they are entitled to do that at the cost of the corporation and are not required to do it at their own private cost. A good deal has been made of phrases which suggest that this is using the funds of the minority for the purposes of the majority. I think that those phrases are wholly inapplicable to the present case. The service rendered by the directors is rendered to every corporator alike whether he be a member of the majority or a member of the minority, and if the minority choose to reject the advice, or if they draw different conclusions from the information given them by the circulars, that does not prevent it being said, in the truest sense of the word, that the directors have impartially put before every member of the corporation the same information and the same advice. It is not suggested here that in their action as directors they were doing anything other than trying to promote the prosperity of the corporation to the utmost of their power. In so doing they treated each member of the corporation exactly alike, and accordingly I can see no ground for the injunction that has been granted.

BUCKLEY L.J. In this action certain stockholders in the London and North Western Railway Company, on behalf of themselves and others, sue the company and its directors for an injunction to restrain payment out of the company's funds of the expenses of sending out proxy papers and circulars and canvassing to obtain the votes of stockholders in the railway company. The plaintiffs allege—and they could only maintain their action if they did allege—that the acts thus done are ultra vires the corporation, an expression which of course means that it is an act which the company in general meeting could not

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authorize, and an act which, if every individual corporator assented to it, would still remain illegitimate.

The position in which the matter arose is this. [Having briefly stated the way in which the controversy between the directors and the plaintiffs had arisen, his Lordship continued:—] The questions at issue with reference to which the circulars and proxy papers were sent out, were questions of policy affecting the conduct of the business of the corporation, and had nothing whatever to do with the directors as individuals.

Now I desire to lay this down as the first proposition which in my judgment is applicable to this case. A corporation in general can only act by its agents. It exists only in contemplation of law and not in physical fact. The only act which occurs to me at present that the corporation can personally do is to assemble in general meeting and pass a resolution. The convening of a general meeting, the use of such machinery as is necessary to express the view of the corporation in general meeting is, I think, as vital and important a corporate act as can be conceived. As a general principle it cannot be ultra vires to use the company's funds bona fide and reasonably for the purpose of obtaining the best expression of the voice of the corporators in general meeting.

The order which is under appeal affirms in substance two propositions. The first is that the directors ought not to seek to influence the votes of the shareholders; the second is one not so much of principle as of detail, namely, that certain expenses, such as those of the stamps on proxy papers and for postage, are matters which ought not to be allowed. Let me say a word on each of these. As regards the first, is it proper that the directors should circulate amongst the shareholders in the company information for the purpose of guiding their judgment in questions of policy, and should endeavour to influence them in that matter by saying, "Our views as your servants or managing partners are that the true policy is so and so, and we ask you to support us in it"? In my opinion it is not only within their power, but it is their manifest duty so to do. It is their duty, they knowing the proper working of the railway undertaking, if a question of policy of this sort is started, to say

to the shareholders, "In our view the policy which is suggested is wrong. We offer you our reasons for thinking so, and we ask you to support us by your vote in the interests of the undertaking in defeating the policy which is suggested." I pause here for the purpose of saying that there is no question at all that in this case the directors are not in any way or in any sense acting in their own interests. They are acting solely and entirely in the interests of the company. As Warrington J. put it at the beginning of his judgment, "The directors acting bona fide to the best of their judgment advocate a particular course of policy."

In my judgment the order is wrong so far as it affirms that the directors ought not to seek to influence the votes of the corporators in such a matter.

Secondly, as regards the question of detail, whether the proxy papers should be stamped and so on. I could understand an argument to the effect, although Sir Edward Carson would not put it, that although a shareholder has a right to vote by proxy, it is a matter for his own convenience only and that he ought to pay all the costs of it. If that is a true principle, then the company ought not even to pay the cost of printing and preparing the proxy paper itself. That contention is not advanced, and if it were advanced it could not, I think, be supported. The true principle seems to me to be this: the company may legitimately do and may defray out of its assets the reasonable expense of doing all such acts as are reasonably necessary for calling the meeting and obtaining the best expression of the corporators' views on the questions to be brought before it. It may, or may not, be reasonable to pay for stamps upon proxies. I expect that it is necessary. There are many people who, if they received a proxy without a stamp, would not take the trouble to return it. If it is sent with the proxy stamped and the return postage stamp affixed, very likely it will come back. Ascertain, as matter of reason and common sense, is this a reasonable thing to do to get the best expression of the popular voice? If it is, then it is not ultra vires.

One more word as to this. I doubt myself very much whether the question of ultra vires in the proper sense really arises

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here at all. Suppose, for instance, the question was whether the stamping of proxies was reasonably necessary in order to get people to vote. Some people might think one thing and some another. Suppose the question were put before the company in general meeting whether they approved the payment of the stamps on the proxies and the majority were in favour of it. I do not think this Court would go back on that and say, "Although the majority of the corporators think it is reasonable to stamp the proxies because they are more likely to come back, we are going to upset that because it is ultra vires." It is a question of degree. I do not say a question of degree may not turn intra vires into ultra vires, but where it is really a question, to a very large extent, of opinion and custom, then I think it is the voice of the corporators which would prevail, and, if that is admitted, there is no question of ultra vires about it.

The decision of Kay J. in *Studdert* v. *Grosvenor* (1) has been relied upon as the basis of the order made by Warrington J. He no doubt could not do otherwise than follow it. I think, however, that the latter part of the judgment in *Studdert* v. *Grosvenor* (1) is wrong. The actual decision, apart from the principles upon which it was based, might perhaps be supported upon the particular facts of that case. If the learned judge thought that the matters in respect of which the votes of the general meeting were asked were whether the directors should have the expenses of their litigation paid out of the funds of the company—that is to say, if he thought it was not really a general meeting for the purposes of the corporation, but a meeting for the purpose of filling the directors' pockets—then the decision, I think, may be supported, but otherwise, as a general proposition, in my opinion, it cannot.

I wish to add a word upon *Pickering* v. *Stephenson*. (2) In *Pickering* v. *Stephenson* (2) the Vice-Chancellor at the last page of his judgment declined to order repayment by the directors of sums of which, if he used the expression ultra vires in its proper sense, he must have ordered repayment. Lindley L.J., in giving the judgment of this Court in *Cullerne* v.

(1) 33 Ch. D. 528. (2) L. R. 14 Eq. 322.

London and Suburban General Permanent Building Society (1), said the Vice-Chancellor was wrong as to that. I suggest that *Pickering* v. *Stephenson* (2) may be explained by saying that the Vice-Chancellor was dealing with the case upon the footing that the company there was not a corporation, nor was the question he was determining a question of ultra vires in the proper sense of the word, but that he was only holding that in what he calls a quasi-partnership, the act was what he calls "ultra vires the majority." If that was his true meaning, then the passage at the end of his judgment is logical, and I am disposed to think that that is what he meant.

I wish to guard myself with one final observation. Those who are conversant with the affairs of joint stock companies are well aware that cases often arise in which the board in power are anxious to maintain themselves in power, to procure their own re-election, or to drive a policy not really in the interests of the corporation, but for some private purpose of their own, down the throats of the corporators at a general meeting, and in which they issue at the expense of the company circulars and proxy papers for the purpose of attaining that object. When a case of that kind comes before the Court, I sincerely trust that the decision of this Court in this case will not be cited as any authority for justifying the action of the directors. The point here decided is that directors bona fide acting in the interests of the corporation, and not to serve their own interests, are entitled and bound to inform and guide the corporators in matters affecting the corporate interests, and any expenses reasonably incurred in so doing may be borne out of the funds of the company.

I agree that the appeal succeeds and that the respondents must pay the costs of it. The action should be dismissed with costs.

Solicitors: *C. de J. Andrewes; Freshfields.*

(1) 25 Q. B. D. 485, 490. (2) L. R. 14 Eq. 322.

W. C. D.

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Oct. 31.

In re BATES.

HODGSON *v.* BATES.

[1905 B. 4967.]

Will—Construction—Tenant for Life and Remainderman—Power to retain Investments—Hazardous Securities—Rule in Howe *v.* Earl of Dartmouth, 7 *Ves.* 137*a*.

By his will a testator gave his personal estate to his wife for life and after her death to other persons, and appointed his wife and the plaintiff trustees of his will. By a codicil the testator empowered his trustees to carry on his businesses of a colliery owner and farmer, and gave them a general discretion "to retain any investments" belonging to him at his death without being responsible for any loss occasioned thereby. The testator was a director of a coal company, limited, which had wide powers of engaging in colliery and other businesses under its articles and memorandum of association, and possessed a considerable reserve fund. At the time of his death the testator was possessed of 336 fully paid up shares of 50*l.* each in the coal company, and in pursuance of their power under the codicil the trustees retained them:—

Held, that the shares were hazardous, but not wasting securities, and the power to retain investments was sufficient to exclude the operation of the rule in *Howe* v. *Earl of Dartmouth*, (1802) 7 Ves. 137a. The tenant for life was, therefore, entitled to the income of the shares so long as the trustees thought fit to retain them.

By his will dated December 6, 1899, Cadwallader John Bates devised all his real estate to his wife, the defendant Josephine Bates, during her life, without impeachment of waste, and after her death to such uses in favour of any descendant, then living or to be born during her lifetime, of his grandfather, John Moore Bates, as his wife should by will appoint, such descendant to take the same real estate in tail male, and in default of any such appointment and so far as any such appointment should not extend, to the use of the testator's brother, Charles Loftus Bates, during his life, and on his death to his eldest son in tail male. And the testator bequeathed all his personal estate to the trustees thereinafter named, upon such trusts as would correspond, as nearly as the rules of law and equity would permit, with the uses thereinbefore declared in respect of his real

estate. And the testator appointed his wife and the plaintiff John Crawford Hodgson trustees and executors of his will, and trustees for the purposes of the Settled Land Acts.

By a codicil dated October 4, 1900, the testator gave to the trustees of his said will full power and authority to carry on for such time and in such manner as they should think desirable the businesses of a colliery owner and farmer then carried on by him, with liberty to employ managers, agents and clerks, and generally to act in the conduct of the said businesses as they, he or she should in their, his or her absolute discretion think fit, without being answerable for any loss arising thereby. The codicil proceeded: "My trustees or trustee may retain any investments belonging to me at the time of my death for such period as to them, him or her may seem proper without being responsible for any loss occasioned thereby."

The testator died on March 18, 1902, and the will was proved on August 11, 1902, by Josephine Bates and the plaintiff. At the time of his death the testator was a director of the Bedlington Coal Company, Limited, and was possessed of 336 fully paid up shares of 50*l.* each in the company.

By the memorandum and articles of association of the company the objects for which the company was established were, inter alia, to purchase, acquire and work the collieries belonging to the business of the Bedlington Coal Company, and to carry on business as colliery owners and workers, and as ship owners, carriers, carmen, and any other business which might promote or assist any such business as aforesaid.

The assets of the Bedlington Coal Company, Limited, consisted of four leasehold collieries, freehold hereditaments at some of them, colliery plant, materials, &c., six leases of coal having terms of from twenty-seven to forty-two years unexpired, and the company had also a reserve fund of 56,585*l.*

The said shares and certain furniture now constituted the whole of the testator's residuary personal estate. In pursuance of the express power given to them by the codicil, the trustees retained the 336 shares in the Bedlington Coal Company, Limited, and Josephine B[illegible]s had received the whole of the dividends thereon. The other defendants to the action

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were the descendants of the testator's grandfather, John Moore Bates.

By the originating summons taken out on behalf of John Crawford Hodgson, the Court was asked to determine whether, upon the true construction of the testator's will and codicil, Josephine Bates became, upon the testator's death, entitled to the whole of the dividends upon the 336 colliery shares, or whether such dividends ought to be apportioned as between capital and income, and if so in what manner such apportionment should be made.

Austen-Cartmell, for the trustees.

P. O. Lawrence, K.C., and *Cassel, K.C.*, for the tenant for life. The question is whether a general discretion to trustees to retain investments without anything more excludes the operation of the rule in *Howe* v. *Earl of Dartmouth*. (1) There is a difference in the case where the testator directs a conversion and then gives a power to retain investments; that by itself does not give the tenant for life the income of the retained investments. It is said that you must look for a gift of the income to the tenant for life pending the conversion. But in the present case there is no direction to convert but a mere power to retain, and there is no clear decision upon the point whether such a power takes the case out of the rule. These shares are hazardous securities, but not wasting securities, and a distinction has been drawn between the two.

The rule in *Howe* v. *Earl of Dartmouth* (1) has been considered in many cases. In *Gray* v. *Siggers* (2) there was a trust for sale after the death of the tenant for life, which would be enough by itself to prevent the operation of the rule requiring a conversion before that event. The case of *In re Sheldon* (3) is strongly in favour of the tenant for life's contention, and shews that the power to retain is inconsistent with the conversion required by the rule. That was a case of a hazardous security, and North J. in that case distinguished *Porter* v. *Baddeley* (4) on the ground that the latter was a case of a wasting security.

(1) 7 Ves. 137a.
(2) (1880) 15 Ch. D. 74.
(3) (1888) 39 Ch. D. 50.
(4) (1877) 5 Ch. D. 542.

The case of *In re Pitcairn* (1) applies directly to the present; there there was a similar discretionary power to convert. In *In re Thomas* (2), which was before your Lordship, there was an express direction to convert, which distinguishes it from the present. The last case on the subject is *In re Chaytor* (3), where there was also a trust for sale. On principle, therefore, it would seem that the tenant for life is entitled to the income of the investments, which are authorized to be retained.

Stewart-Smith, *K.C.*, and *Cozens-Hardy*, for the remaindermen. The rule in *Howe* v. *Earl of Dartmouth* (4) applies to all unauthorized securities whether wasting or not. But for the codicil, the rule would certainly apply. In all the cases cited there have been other words. Here there is a mere power to retain, given either to protect the trustees, or it may be that the testator intended the tenant for life to have the dividends in specie, but there is nothing to shew it, however much the expectant eye looks for an indication of such intention. It is said that the discretion to retain, if acted upon, is enough, but there is no authority for that apart from *In re Sheldon* (5), and that only applies to securities which are not of a wasting character. The mere power of retainer alone, if attributable to the management of the estate, as it may well be here, is not sufficient to get rid of the rule. Further, the distinction attempted to be drawn between wasting and unauthorized securities is not sound, and is expressly negatived by the decision in *In re Chaytor*. (3) The authorities are obscure and intricate upon the point raised in this case as to whether the tenant for life can enjoy in specie, and whether the rule in *Howe* v. *Earl of Dartmouth* (4) applies or not. The rule itself is clearly stated in *Macdonald* v. *Irvine*. (6) Upon the second point raised, these are wasting as well as unauthorized securities.

[KEKEWICH J. As at present advised, I think they are hazardous but not wasting securities.]

No doubt it is difficult to give an exact definition of a wasting security. It must be something that gets less and less every day,

(1) [1896] 2 Ch. 199.
(2) [1891] 3 Ch. 482, 486.
(3) [1905] 1 Ch. 233.
(4) 7 Ves. 137a.
(5) 39 Ch. D. 50.
(6) (1878) 8 Ch. D. 101, 112.

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but there are no proper materials here for deciding whether it is wasting or not.

KEKEWICH J., after dealing with two preliminary points of construction upon the words of the will and holding that under the terms of the will the widow had a life estate in the personalty with a gift after her death to others, proceeded:—That leaves me clear to decide what is the real question before me, and confessedly the point is neatly raised for the first time, in the sense that it is the first time where the point, standing alone, has required decision. In the other cases which have been referred to there was something more than a mere power to retain. The question arises in this way. The property is given to the testator's wife, Josephine Bates, during her life, and after her death to other persons. If there were no codicil the rule in *Howe* v. *Earl of Dartmouth* (1) would apply. There can be no doubt about that. I will not repeat at length the statement of the rule in the judgment of Baggallay L.J. in *Macdonald* v. *Irvine* (2), but I venture to say that you cannot get a clearer statement of the rule and of the meaning of the rule than you have in the language of the learned Lord Justice in that case. I only pause to say that it is a question of intention, and the rule in *Howe* v. *Earl of Dartmouth* (1) is founded on what is presumed to be the intention of the testator, where personal estate is given to one for life and afterwards to others. The testator's presumable intention is that there shall be equality of enjoyment, and that what he enjoys himself during his life shall be enjoyed by those who succeed him. It is the intention presumed by law in the absence of any contrary intention expressed by the testator, and, being only a presumption of intention, it must give way to any intention expressed by the testator. When once you have arrived at the intention of the testator you must give effect to it notwithstanding the rule in *Howe* v. *Earl of Dartmouth.* (1)

Now, in the codicil the testator uses words which certainly shew an intention with reference to the enjoyment of the estate, which has to be examined. The words are these: "My trustees or trustee may retain any investments belonging to me at the

(1) 7 Ves. 137a. (2) 8 Ch. D. 101, 112.

time of my death for such period as to them, him or her may seem proper, without being responsible for any loss occasioned thereby." It is only the motive of the testator which is explained by the last words of this clause. The rule in *Howe* v. *Earl of Dartmouth* (1) says that the conversion must take place as soon as conveniently may be, that is, as soon as possible after the expiration of one year from the testator's death the trustees must realize all securities of a wasting or hazardous character, and place them in proper trust investments, and pay the income to the tenant for life. Pending conversion they must only pay the tenant for life interest on the valuation of the investments at the time when they ought to have been realized. The discretionary power to retain the investments for a time is inconsistent with that, for, if they have the right to retain for such period as they may think fit, they may retain for five years, or indeed may never convert at all; and if so, they are only exercising the discretion given to them by the will. If they do that, they cannot convert, and more than that, the testator, by giving this discretion, has stated in plain and clear language that they are not bound to convert. The obligation to convert and the power to retain at their discretion are inconsistent the one with the other. If they retain, they exclude the operation of the rule. Here I have an expression of intention different to that which the law has imputed to the testator, in the absence of any expression to the contrary. What is the effect of it? They do retain. In what I am about to say I am aware that I am going beyond and using language different from that employed by myself in the case of *In re Thomas* (2), and adopted by other judges, but I am prepared to follow the judgment of North J. in the case of *In re Sheldon* (3), where he says: "I do not see how I can direct the retainer of the existing investments, and at the same time hold that the tenants for life are not entitled to receive the whole of the income produced by those investments."

It seems to me that the direction to retain investments really adds the shares in question to the list of authorized investments. The investments which the trustees, in exercise of their discretion,

(1) 7 Ves. 137a. (2) [1891] 3 Ch. 486.
(3) 39 Ch. D. 50, 53.

KEKEWICH J. 1906 BATES, *In re.* HODGSON v. BATES.

elect to retain are, by the express consent of the testator, added to the trusts and securities, whether put into an investment clause or not. These colliery shares thus become authorized securities. It seems to me that the income of authorized securities must be paid to the tenant for life. Many judges have drawn a distinction between wasting and authorized securities as regards the operation of the rule in *Howe* v. *Earl of Dartmouth*.(1) The definition of wasting securities is difficult. I think, however, they must mean securities the value of which, from the intrinsic nature of the security, decreases from day to day. A leasehold house is a very good example. Long annuities were also wasting securities. There is a strong presumption that the testator does not intend the tenant for life to consume the fruit-bearing tree altogether, but only to have the fruit from the tree from year to year. Therefore the application of the rule in *Howe* v. *Earl of Dartmouth* (1) comes with greater common-sense force as regards wasting securities than as regards hazardous ones, but it applies equally to both cases. The presumption is just the same that the testator intends all parties to stand on an equality in the enjoyment of his estate. But why should that operate as regards the receipt of the income, if once you arrive at the conclusion, at which I have arrived in this case, that the testator, by authorizing his trustees to retain investments, meant to add to the list of investments? Why should you hesitate to say that he intended the tenant for life to have whatever he himself had? He has thought fit to tell the trustees that they may retain the investments, and why should you presume an intention that the tenant for life is not to have that income of the investment retained? Still, other judges have thought differently. In *Porter* v. *Baddeley* (2) the learned judge decided in favour of the application of the rule in *Howe* v. *Earl of Dartmouth* (1) on the ground that it was a wasting security. That is the view of that case which is taken by North J. in *In re Sheldon* (3), and he says so distinctly (4): "In *Porter* v. *Baddeley* (2) the unauthorized securities were of a wasting nature. The same principle does not seem to

(1) 7 Ves. 137a.
(2) 5 Ch. D. 542.
(3) 39 Ch. D. 50.
(4) Ibid. 52.

me to apply to securities which are of a permanent nature, though they may be hazardous."

If it were necessary in the present case to decide that the trustees might retain wasting securities and pay the income to the tenant for life, I should, as at present advised, say they might; but before so deciding it might perhaps be my duty to consider the matter further, as it would be going in the face of several expressions of opinion of learned judges. It is even possible that I might think it my duty not to decide according to my own opinion, but to leave it to the Court of Appeal to review those decisions. I will not say more than that. I have recorded my impression, but I do not decide the point. I am here dealing with hazardous securities, not wasting securities. The investments in question consist of shares in the Bedlington Coal Company, which by the terms of its memorandum of association may carry on the businesses of working collieries, of railway carriers, and so forth. It is a large and extremely successful trading company. I do not think it is possible to say that the shares in this company are wasting securities as applied to this subject-matter. It is not like the case of a single ship company, the shares in which would be distinctly wasting securities. I hold, therefore, that the trustees have power to retain these hazardous securities, and, being thus investments which they are authorized to hold, the tenant for life is entitled to the income derived from them.

Solicitors: *Flux, Leadbitter & Neighbour, for Leadbitter & Harvey, Newcastle-upon-Tyne; Crossman, Prichard & Co., for Stanton, Atkinson & Hudson, Newcastle-upon-Tyne.*

G. M.

KEKEWICH J. 1906 Nov. 6.

In re HENRY. GORDON *v.* GORDON.

[1903 H. 1576.]

Settlement—Tenant for Life and Remainderman—Periodical Payments—Compromise for lump Sum—Apportionment—Payment out of Capital of Estate.

The estate of a testator was liable for a periodical payment of an uncertain amount, and by a deed of compromise this payment was commuted for a lump sum of 7000*l.* and the estate released from the liability.

The plaintiff, who was entitled to a settled share of the testator's estate for her life, with remainder to her children, provided 3500*l.* out of her own moneys to get rid of this liability on the estate :—

Held, that she was entitled to be repaid this sum out of the testator's estate; and the proper mode of apportioning the burden between herself, as tenant for life, and the remaindermen was for the trustees of the will to raise it out of her settled share of the estate.

The rule laid down in *In re Bacon*, (1893) 62 L. J. (Ch.) 445, followed, in preference to that adopted in *In re Dawson*, [1906] 2 Ch. 211.

Adjourned Summons.

The plaintiff was the Hon. Elizabeth Anna Gordon, wife of the defendant the Hon. John Edward Gordon, and the other defendants were the executors of the testator, John Snowden Henry, and Ashley Henry Maude and the five children of Mrs. Gordon. The question raised was whether the executors and trustees of John Snowden Henry ought to raise out of the testator's estate or the share settled on the plaintiff and her children and repay to the plaintiff all or any part of a sum 3500*l.* expended by the plaintiff in 1902 as one-half of the amount paid to discharge an annuity which formed an incumbrance on the testator's estate; and if not, whether they ought to raise and pay to the plaintiff yearly one-half the sum which, as from 1902, would have been paid by way of annuity if the annuity had not been discharged. The question arose under the following state of facts. By a deed dated March 1, 1864, John Snowden Henry conveyed to trustees certain land and warehouses at Manchester upon trust for sale,

and to hold the proceeds upon the trusts declared by another deed of even date, which were for the settlor for life, and after his death to his daughter Elizabeth Anna Henry (the plaintiff) and her issue as therein mentioned, with power to her in certain events to appoint any part of the income to her husband for life. Elizabeth Anna Henry married the defendant John Edward Gordon in 1879. By a deed of March 2, 1864, John Snowden Henry made a conveyance in similar form of certain other land and a warehouse at Bradford to the same trustees upon similar trusts in favour of another daughter, Emma Constance, and her issue, with a power to appoint the income to her husband for life. This power she exercised on April 21, 1876, in view of her marriage with Ashley Henry Maude, and by deed appointed that the income of the trust funds should, after the death of the survivor of herself and her father, be paid to A. H. Maude during his life or until he should do or suffer anything whereby he should cease to receive the same.

By an indenture of April 22, 1876, made between J. S. Henry of the first part, Emma Constance Henry of the second part, the defendant Ashley Henry Maude of the third part, and trustees of the fourth part, J. S. Henry, among other things, covenanted that if during the joint lives of Emma Constance Henry and Ashley Henry Maude, or the life of the survivor of them, the income of the trust funds should not for any one year ending on the anniversary of the marriage amount to 1000*l.*, then, and so often, he, his heirs, executors or administrators, would pay to the trustees such sum as should be required to make up the income for that year to the sum of 1000*l.*, such sum to be applied by them in the manner in which the income of the trust fund should be applicable.

Emma Constance Henry married Ashley Henry Maude on the same 22nd of April, 1876, and there were five daughters of the marriage. On September 1, 1889, Emma Constance Maude died. By his will made on November 21, 1892, J. S. Henry confirmed the said settlements, and appointed John Edward Gordon and Ashley Henry Maude and others executors and trustees of his will, and directed them to hold his residuary estate upon trust for his wife for life, and then upon trust as to

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so much thereof as should be required to be added to the proceeds of sale of the property comprised in the settlement of March 1, 1864, in order to produce an amount equal to one-half of the collective value of his residuary trust estate and the properties comprised in the settlements of March 1 and 2, 1864, respectively, or the proceeds of sale thereof, upon trust to pay the income thereof to his daughter Elizabeth Anna Gordon for her separate use during her life, without power of anticipation, and after her decease in trust for her children equally; and as to the rest of his residuary trust estate, in trust for the daughters of Emma Constance Maude equally.

On October 30, 1896, J. S. Henry died, and on April 11, 1899, his widow died.

The residuary estate of the testator was appropriated by the executors in the proportions required by the will for the benefit of Mrs. Gordon and her issue and for the Misses Maude and their issue.

In the year 1864 the rent of the warehouse at Bradford was 1200*l.* a year, but it had fallen to 750*l.* a year, and the money requisite to make up the 1000*l.* a year was for many years, and down to April 22, 1902, paid to the trustees of the settlement of March 2, 1864, by J. S. Henry during his life, and after his death by the executors out of the income of the residuary estate.

By a deed of release dated June 9, 1902, made between Ashley Henry Maude, his five daughters, and the trustees of the will of J. S. Henry, it was recited that John Edward Gordon and the daughters of Ashley Henry Maude had agreed with Ashley Henry Maude to pay him 7000*l.* out of their own moneys (3500*l.* being provided by John Edward Gordon and the remaining 3500*l.* by the Misses Maude in equal shares) in full settlement and discharge of the liability of the estate of J. S. Henry under the covenant in the deed of April 22, 1876, and it was further recited that the Misses Maude had agreed that the sum of 7000*l.* should be paid to Ashley Henry Maude, and that John Edward Gordon had paid 3500*l.* to A. H. Maude and each of the five daughters of A. H. Maude had paid him 700*l.*; and it was witnessed that in consideration of the premises A. H. Maude and each of the daughters released the executors and estate of J. S. Henry from

the covenant in the deed of April 22, 1876. The 3500*l.* recited in this deed to have been paid by J. E. Gordon was in fact provided by the plaintiff out of her own moneys and at the suggestion of her husband, and there was no evidence of any bargain that she should make a present of it to the estate.

P. O. Lawrence, K.C., and *Christopher James*, for the plaintiff. Mrs. Gordon is entitled to be recouped out of the estate the 3500*l.* which she has paid; and if so, the question is what is the proportion of the amount to be borne by her and those in remainder. The principle upon which the Court proceeds in these cases was laid down in the case of *In re Bacon.* (1)

If the amount is taken out of capital the tenant for life loses the interest on so much as is taken, and thus contributes a fair proportion of the burden. In that case a considered judgment was given by your Lordship after a careful review of the cases, and the general rule there laid down governs the present case. No doubt in a recent decision of Swinfen Eady J. in *In re Dawson* (2) a different conclusion was arrived at and a different method adopted of ascertaining the amount to be borne by the respective estates. That was the case of a testator who had covenanted to pay life annuities and had bequeathed the proceeds of sale of his residuary real and personal estate upon trusts for a tenant for life and remainderman, and it was there held that the successive instalments of the annuities must be borne by income and capital in proportion to the value of the life estate and the reversion, to be ascertained by actuarial values made at the testator's death.

It is impossible, however, to proceed upon that principle here, as definite sums were in fact paid for three years after the testator's death, and a lump sum has been agreed upon under a bona fide compromise. The cases of *Yates* v. *Yates* (3) and *In re Muffett* (4) were cited and considered in the case of *In re Bacon.* (1) It is submitted that the sum of 3500*l.* must be raised out of the capital of the settled estate.

(1) 62 L. J. (Ch.) 445; 41 W. R. 478; 68 L. T. 522.
(2) [1906] 2 Ch. 211.
(3) (1860) 28 Beav. 637.
(4) (1888) 39 Ch. D. 534.

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Jessel, K.C., and *T. T. Method*, for the defendants. When a periodical payment has to be made it is difficult to decide how much is to be borne by the tenant for life and how much by the remainderman. The method of valuation adopted by Swinfen Eady J. is preferable, and followed that adopted in *Allhusen* v. *Whittell* (1) and *Yates* v. *Yates*. (2) In the present case the value of the respective interests of the tenant for life and remaindermen would have to be taken at the time when the compromise was entered into, in 1902. It is only the liability for future payments that can be dealt with. It may be that the different modes of valuing are more questions of convenience in the administration of the estate than of principle. If the principle of *In re Bacon* (3) were applied there would have to be an annual investigation. By taking a lump sum Mrs. Gordon has adopted the very method which Swinfen Eady J. said was a convenient one.

P. O. Lawrence, K.C., in reply. There is no question of providing for future payments; that is precluded by the adoption of a lump sum. It is substituted for the covenant to pay the annuity, and is in the nature of a debt.

KEKEWICH J., after shortly summarizing the facts, continued:— The law is clear when the facts are such as I have stated. The law says that when a tenant for life, such as Mrs. Gordon is in the present case, finds money to get rid of a liability on an estate in which she is interested as tenant for life she only does it for the benefit of the estate to this extent, that she retains her right to have the money back when the administration admits of its being done. That is not the less so because her husband was an executor, and that she handed the money to him, though I understand it was found in such a way that it went directly to Mr. Maude, and though the release recites that really it was found by her husband. All those things are immaterial in the absence of direct evidence that there was a bargain that she should make a present of the 3500*l.* to the estate. There is not only no evidence of it, but there is nothing approaching an indication of

(1) (1867) L. R. 4 Eq. 295.
(2) 28 Beav. 637.
(3) 62 L. J. (Ch.) 445; 41 W. R. 478; 68 L. T. 522.

it. I must take it that she contributed the 3500*l.* because it was convenient to do so, and through the intervention of her husband the matter was settled in that way. All she asks is that she should have her 3500*l.* back out of the estate. It was not a gift to the estate, not perhaps strictly a loan to the estate, but an advance to the estate by a person interested, without any evidence, as far as I can see, of any intention to forego a claim against the estate for the money advanced, and it seems to me that she is clearly entitled to have it.

But then comes the second question, which is a very awkward one. She wants her 3500*l.* back, and I have said she is entitled to have it. There is no question of the interest, because she has been in receipt of the income of her share of the estate, and therefore she cannot have the interest over again. But she is tenant for life, and in some way or other she, as tenant for life, must contribute to the recoupment of the 3500*l.* to the settled estate. She is entitled for life, her children are entitled in remainder. She must contribute her fair proportion as tenant for life, the children must bear the rest, which is the fair proportion attributable to them as remaindermen. How is that to be ascertained in the administration of Mr. Henry's estate?

This question in the way I have put it was thrashed out very fully in a case before me of *In re Bacon* (1), which has been read at length this morning. In that case I did my best to examine the authorities, and took some pains to go carefully into one case of great importance before Chitty J.—*In re Muffett* (2); and I was under the impression, and I am still under the impression, that I strictly followed the lead of that learned judge in determining how the apportionment should be ascertained, and what seemed to me to be the right principle was that the moneys should be raised by a sale or mortgage of a sufficient part of the estate and should be paid in that way out of capital, but that the tenant for life bearing, as he of course would, the interest on the mortgage, there would be a fair distribution of the liability between tenant for life and remaindermen. I do not mean to say that it is scientifically accurate, or that it would always

(1) 62 L. J. Ch. 445; 41 W. R. 478; 68 L. T. 522.
(2) 39 Ch. D. 534.

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work out satisfactorily, but if you are to have a general rule that seemed to me to be the right one and in accordance with the authorities. Unfortunately Swinfen Eady J. in the case of *In re Dawson* (1) has come to a different conclusion. It would have been a satisfaction to me if he had gone into the case of *In re Muffett* (2) and said why he did not follow my criticisms of that case. It may be that those criticisms were incorrect. He does not say so, but he decides the case before him upon a different principle. He takes the actuarial values, at the death of the testator, of the estate of the tenant for life and the estate of the remainderman, and then distributes the liability between the two estates in the proportions ascertained by actuarial valuation. It may be that in a large majority of cases that would work out perfectly well; but several hypothetical instances have occurred to me in the course of the arguments where it would be inconvenient to apply that rule. I think we have one here which illustrates the inconvenience largely. Here the claim is not made at the death of the testator, or within a reasonable time afterwards. Some payments had already been made in respect of the annuity, and what was proposed to be done was not really to calculate the annuity on any scientific rule, but by agreement between the parties it was arranged at a lump sum. That seems to me to approach more nearly to a claim for a debt of an ascertained sum than to a claim for an annuity. I venture to think that even if I were prepared to adopt Swinfen Eady J.'s rule in preference to my own, which I am not, I should be justified in saying that my rule is more directly applicable, more convenient, and more according to the practice of the Court as regards a claim of this particular character—a claim in respect of a lump sum paid down for the compromise of a periodical claim. I asked Mr. Jessel when the actuarial valuation was to be taken. He does not for a moment suggest that the date of the testator's death would be right. He says here that it should be at the time when the lump sum was paid or when it was arranged that it should be paid. That is a departure or a variation, at any rate, from Swinfen Eady J.'s rule. It is fixing another

(1) [1906] 2 Ch. 211. (2) 39 Ch. D. 534.

time, and it seems that one might, by varying the circumstances very slightly, vary the date again and again and prevent the rule being one of at all certain application, though it might be a certain convenience. Suffice it for me to say that I must adhere to what I said in *In re Bacon* (1), and hold that the proper way of dealing with this case is to make the 3500*l.* come out of the estate by sale or mortgage, and then Mrs. Gordon will lose, from the date of the money being raised, the interest on 3500*l.* which she has up to this time received. She will in that way contribute so long as she lives a fair proportion of the debt. If her life is short she will contribute very little. That is a difficulty which is quite as inherent to an actuarial valuation as to the plan which I propose to pursue. Whatever you may put down on tables, however you may calculate, life after all is necessarily uncertain, and you must only go on on a general notion that the tenant for life is to pay a fair proportion, having regard to whatever that life may be. I must make an order, therefore, in that way.

Solicitors: *E. & J. Mote; Burgess, Taylor & Tryon.*

(1) 62 L. J. Ch. 445; 41 W. R. 478; 68 L. T. 522.

G. M.

SWINFEN EADY J.

1906

Oct. 25; *Nov.* 3.

LORD LECONFIELD *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

[1904 L. 2595.]

Lands Clauses Acts—Compensation—Copyholds—Enfranchisement—Fines—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 95, 96, 97.

Copyholds conveyed to a railway company by a conveyance subsequently enrolled under s. 95 of the Lands Clauses Consolidation Act, 1845, pass as freeholds on enrolment, but nevertheless, until enfranchisement by the company, they continue subject (inter alia) to fines payable on the deaths of the vendor and his successors before or after enrolment, and these fines must be included in the compensation for enfranchisement.

In re Wilson's Estate, (1862) 2 J. & H. 619, 623; (1863) 3 D. J. & S. 410, 417; *In re Marquis of Salisbury and London and North Western Ry. Co.* (1879), [1892] 1 Ch. 75, n.; and *Lowther* v. *Caledonian Ry. Co.*, [1892] 1 Ch. 73, 82, 83, 85, applied.

Special Case.

The plaintiff was the lord of the manor of Fivetowns-with-Eaglesfield, in the county of Cumberland.

In the said manor are situate divers customary tenements, held at the will of the lord according to the custom of the manor.

By the custom of the manor admittances are from time to time made upon the rolls, whereby the customary tenements are demised to the tenant during the joint lives of the lord and the tenant at the will of the lord, according to the custom of the manor, subject to the payment of certain yearly customary rents and performance of certain services and customs. The tenant is prohibited from alienating without the licence of the lord. These admittances are made upon the death of the lord, and upon the death or alienation of the tenant. On an admittance on the lord's death a general fine is payable. On an admittance on the tenant's death or alienation a dropping fine is payable. These fines are arbitrary fines, amounting to two years' improved annual value of the tenement.

In 1867 the defendants' predecessors, in exercise of the powers of a special Act incorporating the Lands Clauses Consolidation

Act, 1845, acquired the customary tenement 23, Fivetowns, from Catherine Bouch, the tenant on the rolls (as trustee for Amos Robinson), and took possession, and by a conveyance dated August 16, 1867, Catherine Bouch and others conveyed 23, Fivetowns, to the defendants' predecessors. The first Lord Leconfield was then life tenant of the manor.

Subsequent to this conveyance the following events happened.

In 1869 the first Lord Leconfield died, and in 1871 Catherine Bouch was as upon his death duly re-admitted on the rolls, but no general fine was assessed or paid. The second Lord Leconfield was then life tenant of the manor.

On March 24, 1874, Catherine Bouch died intestate, leaving John Bouch her customary heir.

On November 23, 1882, John Bouch died, leaving Percival Bouch his customary heir and customary heir of Catherine Bouch. John Bouch devised all estates vested in him as trustee to his executors, one of whom was still living.

No admittance had been made or fine paid since the death of Catherine Bouch, whose name was still on the rolls as tenant.

On March 25, 1892, the conveyance of 1867 was enrolled on the rolls of the manor pursuant to s. 95 of the Lands Clauses Consolidation Act, 1845.

The lord's rent of 2*s*. per annum, payable at Michaelmas, was duly paid by the defendants from Michaelmas, 1892, to Michaelmas, 1897, since when no rent had been paid.

On January 6, 1901, the second Lord Leconfield died, and the plaintiff became lord of the manor for life.

In 1867 the defendants' predecessors also took possession of plot A, part of a customary tenement, 25, Fivetowns.

In 1871 Silas George Saul was admitted to 25, Fivetowns, as devisee of trust estates under the will of John Harris, who died on January 25, 1863, and re-admitted as on the death of the first Lord Leconfield, all fines being duly paid.

By a conveyance dated May 17, 1872, Silas George Saul and others duly conveyed plot A to the defendants' predecessors.

Subsequent to this conveyance the following events happened.

On March 25, 1892, the conveyance was enrolled under s. 95.

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On June 10, 1892, Joseph Harris, who was beneficially entitled to 25, Fivetowns, subject to the above conveyance of plot A, was admitted, on the conveyance and surrender of Silas George Saul, to the rest of 25, Fivetowns, and the fine on admittance was duly paid. The lord's rent of 2*s.* 2*d.* was at the same time apportioned, 6*d.* being apportioned on plot A and 1*s.* 8*d.* on the rest of the property. The name of Silas George Saul was still on the rolls as tenant of plot A.

The rent of 6*d.* apportioned on plot A was duly paid by the defendants from Michaelmas, 1892, to Michaelmas, 1897, since when no rent had been paid.

On December 31, 1892, the tenement 25, Fivetowns, other than plot A, was enfranchised.

On January 6, 1901, the second Lord Leconfield died, and the plaintiff became lord of the manor for life, as already stated.

On April 9, 1905, Silas George Saul died, but no fine was paid on his death.

The defendants had recently applied to the plaintiff to enfranchise 23, Fivetowns, and plot A. Before taking the necessary steps to have the compensation assessed, the parties stated this special case to determine whether the plaintiff was entitled to require payment from the defendants of any, and if so of how many, dropping fines in respect of 23, Fivetowns, and plot A, and whether in estimating the compensation to be paid by the defendants in respect of the enfranchisement an allowance should be made for the loss in respect of any, and if so what, specific dropping fines.

No question was raised as to the general fines, as it was admitted that the general fine of 1901 was payable on the improved value of the land and that the general fine of 1871 was statute-barred according to the decision in *Monckton* v. *Payne*. (1)

Hon. E. C. Macnaghten, K.C., and *Austen-Cartmell*, for the plaintiff. The question depends on ss. 95, 96, 97 of the Lands Clauses Consolidation Act, 1845. (2) The effect of these sections

(1) [1899] 2 Q. B. 603.

(2) The Lands Clauses Consolidation Act, 1845, provides as follows:—

Sect. 95. "Every conveyance to the promoters . . . . of any lands . . . . of copyhold or customary tenure, ... shall be entered on the rolls of the manor . . . . and on

is that until enfranchisement under ss. 96, 97 the lord's right to all fines of any nature is preserved by s. 95, and they must be included in the compensation: *In re Wilson's Estate* (1); *Lowther* v. *Caledonian Ry. Co.* (2) In the case of 23, Fivetowns, the two dropping fines accruing on the deaths of Catherine and John Bouch became due before enrolment, so that they would be payable quite apart from s. 95, as until enrolment the lord's rights are not affected by the conveyance.

Danckwerts, K.C., and *H. Stuart Moore*, for the defendants. The true effect of the sections is that until enfranchisement the promoters are statutory tenants of the land subject to fines that occur in respect of their tenancy: *Ecclesiastical Commissioners* v. *London and South Western Ry. Co.* (3) These would include general fines payable on the lord's death as in *Lowther*

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payment to the steward . . . . of such fees as would be due to him on the surrender of the same lands to the use of a purchaser thereof he shall make such enrolment; and every such conveyance, when so enrolled, shall have the like effect, in respect of such copyhold or customary lands, as if the same had been of freehold tenure, nevertheless, until such lands shall have been enfranchised by virtue of the powers hereinafter contained, they shall continue subject to the same fines, rents, heriots, and services as were theretofore payable and of right accustomed."

Sect. 96. "Within three months after the enrolment of the conveyance of any such copyhold or customary lands, or within one month after the promoters . . . . shall enter upon . . . . the same . . . . whichever shall first happen, ... the promoters . . . . shall procure . . . . the lands . . . . to be enfranchised, and for that purpose shall apply to the lord of the manor . . . . to enfranchise the same, and shall pay to him such compensation in respect thereof as shall be agreed upon . . . . and if the parties fail to agree respecting the amount of the compensation . . . . the same shall be determined as in other cases of disputed compensation; and in estimating such compensation the loss in respect of the fines, heriots, and other services payable on death, descent, or alienation, or any other matters which would be lost by the vesting of such copyhold or customary lands in the promoters . . . . or by the enfranchisement of the same, shall be allowed for."

Sect. 97. "Upon payment or tender of the compensation . . . . the lord of the manor . . . . shall enfranchise such lands, and the lands so enfranchised shall for ever thereafter be held in free and common soccage; . . . ."

(1) 2 J. & H. 619, 623; 3 D. J. & S. 410, 417.

(2) [1891] 3 Ch. 443 [1892] 1 Ch. 73, 82, 83, 85.

(3) (1854) 14 C. B. 743, 755.

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v. *Caledonian Ry. Co.* (1), but not dropping fines payable on the death of the vendor or his quasi-successors whose tenancy the promoters have displaced and whose interest has wholly ceased.

In *Lowther* v. *Caledonian Ry. Co.* (2) Stirling J. said: "By s. 95 a conveyance of copyhold lands to the promoters of the undertaking, when enrolled in accordance with the Act, has the like effect in respect of the copyhold lands as if the same had been of freehold tenure. Such a conveyance consequently vests the lands in the promoters, and does not pass merely an equitable estate, viz., that of the copyhold tenant on the rolls, as was held to be the effect of conveyances made under statutes earlier in date than the Lands Clauses Consolidation Act, 1845: see *Dimes* v. *Grand Junction Canal Co.* (3). It is provided, nevertheless, that 'until such lands shall have been enfranchised by virtue of the powers hereinafter contained they shall continue subject to the same fines, rents, heriots, and services as were theretofore payable and of right accustomed.' . . . . It is, however, obvious that in many cases, perhaps in most, the lord would, notwithstanding this provision, lose a large portion of the fruits of the tenure. Fines, for example, are usually payable on death of the tenant or alienation by him; and these would cease upon the land becoming vested in such a corporation as a railway company for the purposes of the undertaking. It is accordingly provided by s. 96 that, in estimating the compensation to be paid to the lord, loss in respect of fines, or other matters which would be lost by the vesting of the copyholds in the promoters of the undertaking, shall be allowed for."

There is nothing inconsistent with this in the judgments of the Court of Appeal (4), though they reversed the judgment of Stirling J. in so far as he held that compensation for enfranchisement was to be assessed on the improved value.

These dropping fines are therefore lost to the lord, and he is entitled to compensation under s. 96, to be assessed as at the expiry of one month after the promoters took possession in 1867 and on the then value of the lands. The compensation will

(1) [1891] 3 Ch. 443; [1892] 1 Ch. 73.
(2) [1891] 3 Ch. 448, 449.
(3) (1852) 3 H. L. C. 794.
(4) [1892] 1 Ch. 73.

include an allowance for the loss of all dropping fines from that date, and will bear interest at 4 per cent. from 1867: *Rhys* v. *Dare Valley Ry. Co.* (1); so that if the promoters are also liable for intermediate dropping fines on the deaths of the vendors or their successors they will be paying twice over.

No fine is payable on conveyance or enrolment, or any compensation for loss thereof: *Ecclesiastical Commissioners* v. *London and South Western Ry. Co.* (2), and it would be strange if any subsequent fine were payable in respect of anything happening to the vendors or their successors.

Hon. E. C. Macnaghten, K.C., in reply. The defendants' argument restricts the operation of s. 95 to general fines. But there are so few manors in which general fines are payable that this construction to a great extent renders the section nugatory. The section is intended to apply to all manors, and the only way of giving practical effect to it is to treat the vendors as notional tenants until enfranchisement. Until enrolment they are undoubtedly tenants as trustees for the promoters, and the lord is clearly entitled to fines payable on their deaths. This covers the fines on 23, Fivetowns. After enrolment the vendors continue notional tenants until enfranchisement, for the purpose of preserving the lord's rights. On this view the lord is entitled to a dropping fine on plot A, on the death of Silas George Saul.

Cur. adv. vult.

Nov. 3. SWINFEN EADY J. The question raised by this special case is whether the plaintiff is entitled to any, and what, dropping fines, or to compensation in respect of any, and what, specific dropping fines in respect of the hereditaments comprised in the respective conveyances of August 16, 1867, and May 17, 1872. The former conveyance was not enrolled on the manor rolls until March 25, 1892, and in the meantime the tenant on the rolls who executed the conveyance to the defendants' predecessors had died, and subsequently her customary heir had also died. In the case of the latter conveyance, the tenant who conveyed was alive at the date of enrolment, but died subsequently and before enfranchisement.

(1) (1874) L. R. 19 Eq. 93. (2) 14 C. B. 743.

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The case depends upon the true construction of the Lands Clauses Consolidation Act, 1845. The plaintiff contends that his compensation is to be fixed on the basis of including all fines which would have accrued before enfranchisement if the company had not taken the land, together with compensation for commuting future claims on the usual scale. The defendants contend that the dropping fines which would actually have accrued due in the events which have happened, had the company not taken the land, cannot be taken into consideration; but that the plaintiff is only entitled to compensation for commuting future claims, on the usual scale, to be assessed as at the date mentioned in the Act—namely, one month after taking possession—together with interest thereon at 4 per cent. from that date.

Sect. 95 provides that the conveyance of the copyhold hereditaments to the promoters of the undertaking when enrolled shall have the like effect as if the hereditaments had been of freehold tenure; "nevertheless, until such lands shall have been enfranchised by virtue of the powers hereinafter contained, they shall continue subject to the same fines, rents, heriots, and services as were theretofore payable and of right accustomed." In my opinion, proper effect can only be given to these words by holding that until enfranchisement the lord is to be entitled to the same fines as would have accrued payable but for the taking of the land by the company.

This is the view which has been expressed by judges at different times when this section has been under consideration. Thus in *In re Wilson's Estate* (1) Wood V.-C. said that under s. 95 the company would continue liable to the accustomed fines until enfranchisement. On appeal (2), Turner L.J. intimated that those fines would be taken into consideration in estimating the compensation, but declined to give any opinion on the point, as not arising in the case before the Court.

In *In re Marquis of Salisbury and London and North Western Ry. Co.* (3) Jessel M.R. expressed the view that the lord would be entitled to the intermediate fines; but whether he would also obtain interest was a question for the valuer.

(1) 2 J. & H. 619, 623. (2) 3 D. J. & S. 410, 417.
(3) [1892] 1 Ch. 75, n., 77, n.

Referring to the date at which the company were legally bound to enfranchise, he said: "The company is the owner of the land discharged from manorial rights, and the lord has a title to the purchase-money of those rights. He has to a certain extent, if I may say so, ceased to be lord. I say to a certain extent, because for a temporary purpose he does get the rents and services. It is for the valuer to consider whether he would make the company pay interest or whether the interim receipt of fines, &c., is more than a compensation. I cannot tell that. That is a question for the valuer. He can easily ascertain it though I cannot. It may be the fines are so trifling that they are no compensation at all for the interest on the purchase-money. That he will decide in assessing the compensation."

Again, in *Lowther* v. *Caledonian Ry. Co.* (1), Lindley L.J. referred to the possibility of delay in enfranchising, and said (2): "If there is delay, that is provided for, since the lord gets under the last part of s. 95 the same fines, rents, heriots, and services as were payable under the custom of the manor." Bowen L.J. said that he entirely took the same view; and Fry L.J. said (3): "The 95th section has reserved to him the rights to the fines, and all the other fruits of tenure, until the enfranchisement."

I therefore answer the special case by saying that the plaintiff is entitled to require the defendants to pay—or that in estimating the compensation payable to him there are to be taken into account—all dropping fines arising between the date fixed by the Act for compulsory enfranchisement, that is, the expiration of one month from possession being taken, and the actual enfranchisement. This will include the dropping fines payable on the deaths of Catherine Bouch, John Bouch, and Silas George Saul.

Solicitors: *Milles, Jennings White & Foster, for S. G. & G. F. Saul, Carlisle; Currey & Co.*

(1) [1892] 1 Ch. 73. (2) [1892] 1 Ch. 82.
(3) [1892] 1 Ch. 85.

G. R. A.

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Oct. 27; *Nov.* 3.

In re HUNTER AND HEWLETT'S CONTRACT.

[1906 H. 1771.]

Settled Estate—Subject of Settlement—Conveyance to Trustees without Words of Limitation—Estate pur autre vie—Reversion in Settlor—Power of Tenant for Life to sell Fee—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 2; *s.* 20, *sub-s.* 1; *s.* 58, *sub-s.* 1 (*v.*), (*vi.*).

Where under a settlement the trustees take only an estate for their lives, and that of the survivor, the reversion in fee left in the settlor is comprised in "the subject of the settlement" by virtue of the Settled Land Act, 1882, s. 2, sub-s. 2, and a person having the powers of a tenant for life under that Act can sell and make a good title to the fee simple.

By an indenture of settlement dated February 21, 1889, and made between John Ridley Hunter of the first part, Emily Hunter and Millicent Hunter, spinsters (his daughters), of the second part, and J. W. Miller and B. F. Hawksley (who and other the trustees for the time being thereof were thereinafter called the trustees) of the third part, after a recital that J. R. Hunter was seised in fee of an undivided moiety of the hereditaments thereinafter described, J. R. Hunter, in consideration of his natural love and affection for his daughters, conveyed unto the trustees all that his one equal undivided half share or moiety of and in a freehold building in the City of London therein described to hold the same to the trustees as to one equal moiety thereof (being one undivided fourth part of the whole of the said hereditaments) to the use of the said Emily Hunter and her assigns during her life without impeachment of waste and after her decease to the use of her husband if any as she should by deed or will appoint, with remainders to the use of her children and issue as therein mentioned, with remainder to the use of the said J. R. Hunter his heirs and assigns. And as to the remaining equal moiety to the like uses in favour of the said Millicent Hunter her husband if any and issue and the said J. R. Hunter as were thereinbefore declared in favour of Emily Hunter her husband if any and issue and the said J. R. Hunter

concerning the first mentioned moiety. And the trustees were thereby appointed trustees for the purposes of the Settled Land Acts.

On February 26, 1906, the two daughters of the settlor, and the persons entitled to the other moiety of the hereditaments, entered into a contract with the purchaser for the sale to him of the whole of the hereditaments at the price of 6000*l.*

The purchaser took the objection that the settlement limited the hereditaments to the trustees only, without any mention of heirs, and they took life estates only, and the uses engrafted thereon could not extend beyond the estate for lives granted to the trustees.

The vendors answered that the daughters of J. R. Hunter would make a good title as tenants for life under the Settled Land Act, 1882, to the moiety comprised in the settlement.

This summons was taken out by the purchaser under the Vendor and Purchaser Act, 1874, for a declaration that a good title had not been shewn, or alternatively that it was not one which the purchaser ought to be forced to accept.

No question arose as to the title to the other moiety of the hereditaments.

Harold Burrows, for the purchaser. The settlement was voluntary; it is therefore impossible to enlarge the grant by spelling out a covenant or agreement to settle. All the uses must be limited to the period of the grant, i.e., to the trustees for their joint lives and the life of the survivor. In order to bring the case within the Settled Land Act, 1882, it must be shewn that there is a settlement by the instrument. A settlement by the joint operation of the instrument and a presumption at law is not sufficient. That is clear from s. 2, sub-s. 1, of the Settled Land Act, 1882 (45 & 46 Vict. c. 38). Sect. 2, sub-s. 2, of that Act (1) will be relied on, but that sub-section applies only to cases where the fee is conveyed to the trustees, but the uses

(1) Settled Land Act, 1882, s. 2, sub-s. 2: "An estate or interest in remainder or reversion not disposed of by the settlement, and reverting to the settlor or descending to the testator's heir, is for purposes of this Act an estate or interest coming to the settlor or heir under or by virtue of the settlement, and comprised in the subject of the settlement."

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do not exhaust the fee, or some of the uses fail. It was necessary to provide for that case, because if there were any reverter to the settlor not included in the settlement, he would at common law have taken under his old estate, and not under the settlement. The Inheritance Act, 1833 (3 & 4 Will. 4, c. 106), s. 3, enabled a man to convey to himself, but did not deal with the case of reverter. If this point had not been provided for the purchaser would have had to be satisfied in every case that there was no possibility of any of the uses of the settlement failing. The words of s. 2, sub-s. 2, of the Settled Land Act are in effect the same as those of the Settled Estates Act, 1858, repeated in the Settled Estates Act, 1877, s. 2. If a mere grant of an estate for life made a settlement all the argument in the numerous cases as to what was a settlement under those Acts would have been unnecessary.

Eve, K.C., and *Spence*, for the vendors. We cannot argue that the settlement contains an assurance of the fee simple. But the case is within the Settled Land Act, s. 2, sub-s. 2. The words "and comprised in the subject of the settlement" are not in the Settled Estates Acts, and those words shew that the section was intended to include something which was not assured by the instruments creating the settlement. There is nothing to limit the section to cases where the trustees take the fee. *In re Bond* (1) is in our favour. The settlement in this case appointed trustees for the purposes of the Settled Land Acts.

Harold Burrows, in reply. In *In re Bond* (1) Joyce J., who then argued the case for the Crown, did not desire to impeach the sale.

Cur. adv. vult.

Nov. 3. SWINFEN EADY J. This summons relates to one moiety of the property settled by a voluntary settlement of February 21, 1889. It is not contended that any greater estate than an estate pur autre vie in one moiety passed by the voluntary settlement. This moiety was settled during the life of the trustees and the survivor of them for the benefit of the two daughters of the settlor, their husbands and issue as therein mentioned. The

(1) [1901] 1 Ch. 15.

reversion in fee expectant on the decease of the survivor of the trustees remained in the settlor, John Ridley Hunter. Having regard to the limitations, the deed of February 21, 1889, is a settlement within the Settled Land Acts, and each daughter is a person having the power of a tenant for life under s. 58, sub-s. 1 (v.), (vi.). The real question is, Can the daughters sell and convey the fee simple in one moiety or merely the estates pur autre vie? The whole of this moiety is not in fact comprised in the settlement; the reversion expectant on the decease of the trustees was separated from the particular estate thereby granted. [His Lordship read s. 2, sub-s. 2, of the Settled Land Act, 1882, above set out, and continued:]—

The reversion in question is "an estate or interest in . . . . reversion not disposed of by a settlement and reverting, to the settlor"; therefore it is for the purposes of the Settled Land Act "an estate or interest coming to the settlor under or by virtue of the settlement and comprised in the subject of the settlement."

Although the reversion is separated off from the particular estate by the settlement itself and remains vested in the grantor, and is not in fact comprised in the settlement, the effect of the Act is to treat it for the purposes of the Act as if it were comprised in the subject of the settlement. Therefore the settlement is for the purposes of the Settled Land Act a settlement of the moiety of the fee, that moiety is settled land for the purposes of the Act; and each daughter, having the powers of a tenant for life, can sell and convey a half part of the moiety, the purchase-money being paid to the trustees of the settlement.

It was urged that, having regard to s. 20, sub-s. 1, a tenant for life can only sell and convey for the estate or interest the subject of settlement; but the reversion is comprised within this description, by force of s. 2, sub-s. 2. The language of this sub-section is more comprehensive than clause 3 of s. 2 of the Settled Estates Act, 1877.

I therefore decide that the vendors can make a good title.

The purchaser must pay the costs of the summons.

Solicitors: *Hyde, Tandy, Mahon & Sayer; Hollams, Sons, Coward & Hawksley.*

J. R. B.

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Nov. 14.

In re EARL OF WILTON'S SETTLED ESTATES.

[1906 W. 2150.]

Settled Land—Contract by Tenant for Life to sell—Price to be fixed by Arbitration—Breach of Trust—Confirmation by Act of Parliament—Local and Personal Act—Statutory Effect—Rights of other Persons interested in the Estate.

The tenant for life of settled land agreed to sell it in fee simple for a price to be fixed by arbitration. The agreement purported to be made by him under the Settled Land Acts as tenant for life. It provided that the award should be binding on all persons interested in the estates, and that the agreement itself should be conditional on the sanction of Parliament being given to the vendor and the purchasers to carry it into effect. A private Act of Parliament was accordingly obtained by which the agreement was "confirmed and made binding on the parties thereto respectively, and the same shall and may be carried into effect accordingly":—

Held, that statutory effect must be given to the terms of the agreement; the vendor must carry out the sale with all its consequences; and that all the parties interested in the settled land were bound although they were not mentioned in the Act.

Under the compound settlement of the Wilton estates certain lands at Prestwich, in the county of Lancaster, stood limited to uses under which the Earl of Wilton was tenant for life in possession, subject to a demise to Sir Frederic Johnstone, Bart., and Vicount Grey de Wilton, an infant, was the first tenant in tail in remainder. The corporation of Manchester were desirous of acquiring part of these lands; and on April 26, 1904, an agreement was entered into between the Earl of Wilton (thereinafter described as the vendor) of the first part, Sir F. Johnstone of the second part, and the corporation (thereinafter called the purchasers) of the third part; whereby the vendor, with the consent of Sir F. Johnstone, agreed to sell and the purchasers to purchase the inheritance in fee simple in possession free from incumbrances of the land in question. The price was to include compensation for all damage done to other lands of the vendor or other persons interested in the Wilton estates by reason of the severance of the land. Clause 4 was as follows:—

"The price to be paid for the purchase of the said lands

and hereditaments so provided in the last preceding clause and the sum to be allowed by the vendor for the site of the road between F and G on the said plan as hereinafter mentioned shall be referred to the arbitration of two indifferent persons one to be appointed by each party to this agreement of the first and third parts respectively or in the event of disagreement between the said arbitrators to an umpire to be agreed upon by the arbitrators before entering upon the arbitration or in default of such agreement to an umpire to be appointed by the Board of Trade and the award or determination which shall be made by the said arbitrators or umpire shall be final and binding upon all the parties hereto respectively and upon all parties interested in the said Wilton estates and their respective heirs successors executors administrators and assigns."

This clause further provided that the vendor and the purchasers respectively and all persons claiming through them should be at liberty to attend the arbitration, and that no other persons interested in the Wilton estates except the parties thereto of the first and second parts should be entitled to attend. Clause 5 provided that the purchasers, being well acquainted with the vendor's title, should accept his title as tenant for life subject to the conveyance to Sir F. Johnstone. By clause 18 the purchase was to be completed at the expiration of four calendar months from the date of the award determining the price; the purchase-money was to be paid to the trustees of the compound settlement for the purposes of the Settled Land Acts at the office of the vendor's solicitors; and the trustees were to be parties to the conveyance. Clause 19 was in these terms:—

"This agreement is conditional on the sanction of Parliament by local Act being given to the purchasers to purchase the said lands and hereditaments and to execute the works herein provided for or referred to and to confirm the present agreement with such modifications (if any) as Parliament may make therein and authorising the vendor and the purchasers to carry the same into effect . . . ."

The corporation accordingly applied for and obtained an Act of Parliament, called the Manchester Corporation (General Powers) Act, 1904 (4 Edw. 7, c. ccxxxv.), to confer further powers on them

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for the construction of waterworks and streets. There was nothing in the preamble to the Act which referred in any way to the agreement; but s. 19 was as follows:—

"The agreement dated the twenty-sixth day of April one thousand nine hundred and four and made between the Right Honourable Arthur George Earl of Wilton of the first part Sir Frederic John William Johnstone of the second part and the Corporation of the third part as set forth in the Fourth Schedule to this Act is hereby confirmed and made binding on the parties thereto respectively and the same shall and may be carried into effect accordingly." No persons interested in the Wilton estates were represented before Parliament whilst the Bill was being passed.

The arbitration proceeded. The vendor claimed about 55,000*l.*; and eventually the umpire made his award fixing the sum of 23,805*l.* 4*s.* 7*d.* as the amount of purchase-money and compensation to be paid by the corporation for the purchase in fee simple of the land. It was stated that the corporation had before the arbitration offered to pay a higher price than that actually awarded. A question arose whether the trustees were justified in concurring in the sale, and they took out a summons asking—(1.) whether the agreement was a proper one to be entered into by the Earl of Wilton as tenant for life; (2.) whether the agreement and the award were by s. 19 of the Manchester Corporation (General Powers) Act, 1904, or otherwise binding on all persons interested in the estate created by the compound settlement; and (3.) whether the trustees ought to concur in the conveyance of the property and give a receipt for the purchase-money.

Cave, K.C., and *T. T. Method*, for the trustees.

Rowden, K.C., and *Borthwick*, for the tenant for life. We do not dispute that a tenant for life under the Settled Land Acts cannot sell at a price to be fixed by arbitration. It is settled that such a sale would be a breach of trust on his part: *Peters* v. *Lewes and East Grinstead Ry. Co.* (1) The agreement, therefore, could not have been enforced but for the Manchester Corporation (General Powers) Act, 1904. The agreement is scheduled to

(1) (1880) 16 Ch. D. 703; (1881) 18 Ch. D. 429, 436.

that Act, and s. 19 confirms it and directs that it shall be carried into effect. That gives statutory validity to every clause of the agreement, and makes it binding on all parties interested in the Wilton estates: *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* (1); *Sevenoaks, Maidstone and Tunbridge Ry. Co.* v. *London, Chatham and Dover Ry. Co.* (2) It is sufficient if the Act makes the agreement binding on the tenant for life. The result is that he must carry out the agreement although in doing so he commits what would otherwise have been a breach of trust. The difficulty in his way is removed by the Act. On the face of the agreement he contracted to sell as tenant for life under the powers conferred by the Settled Land Acts, and if he carries out the agreement all the parties interested in the settled estates will be bound.

Norton, K.C., and *Sheldon*, for the infant tenant in tail in remainder. The tenant for life could not sell for a price to be fixed by arbitration, and the Act of 1904 did not cure the defect. The purchasers had notice of this, and could not get a good title; and s. 19 of the Act was only intended to enable them to buy. Clause 19 of the agreement provides that the sanction of Parliament shall be obtained to the purchase by the corporation; it does not refer to the power of the vendor to sell. There is no suggestion in the agreement that Parliament is to be asked to sanction a sale by him of property belonging to other persons without consulting them. The Act does not authorize such a sale. The agreement is not referred to except in s. 19. It is not even mentioned in the preamble. Sect. 19 only makes the agreement binding on the parties thereto. The remaindermen were not parties to the agreement. This is only a local and personal Act, and does not bind any persons who are not mentioned in it or who were not represented before Parliament during the passing of the Bill. This point did not arise in *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* (1), for by the Act in that case the contract was expressly made binding on the parties to it, one of whom was trying to get out of his contract. None of the persons interested in the Wilton estates were represented when the Bill was before Parliament, and

(1) [1900] 2 Ch. 352; [1901] 2 Ch. 37. (2) (1879) 11 Ch. D. 625.

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the remaindermen could not be bound unless they were served with notice of the Bill and appeared or declined to appear: *Barrington's Case* (1); *Lucy* v. *Levington* (2); *Dawson* v. *Paver*. (3) This Act does not bind the remaindermen in express words or by necessary implication. It would be satisfied by a sale of the vendor's own interest, and after his death we could bring an action for ejectment.

Waggett, for Sir F. Johnstone.

Rowden, K.C., in reply. Scheduling an agreement to an Act of Parliament gives it statutory validity as a whole. The contract deals with the persons who are entitled in remainder. We do not contend that strangers are bound by local and personal Acts: but these are not strangers; they can be bound by the tenant for life, and the only agreement which the Act directs to be carried out is an agreement to sell the fee simple. It is impossible to construe this as an agreement to sell the life estate only. The contract cannot be carried out without binding the remaindermen. It is the Settled Land Acts which have given the tenant for life the power to bind them. The only defect in the agreement is that he has broken the rule delegatus delegare non potest, and that is cured by the Act of 1904.

WARRINGTON J. The question in this case is whether an agreement made between Lord Wilton of the first part, Sir F. Johnstone of the second part, and the corporation of Manchester of the third part was or was not a proper agreement to be entered into by Lord Wilton as tenant for life, and whether the agreement and the award of the umpire made pursuant to it are by virtue of the Manchester Corporation (General Powers) Act, 1904, or otherwise binding on all the other persons interested under the settlement. The point, therefore, is really that which is raised on the second question of the summons. [His Lordship stated the facts, and continued:—] There is nothing in the preamble to the Act of 1904 which throws any light on the intention of Parliament in passing s. 19, and the agreement is not referred to. It is not suggested that any persons interested in the settled

(1) (1611) 8 Rep. 136b, 138a, resolution 4.

(2) (1671) 1 Vent. 175.

(3) (1847) 5 Hare, 415.

estates were before Parliament when the Bill was passing through the House. The argument for the remaindermen is that the effect of s. 19 of the Act of 1904 is only to enable the corporation to purchase, and that, whether that be so or not, it did not enable Lord Wilton to convey the settled estate and by that conveyance affect the title of the remaindermen; or, to put it baldly as Mr. Norton did, the Act did not enable Lord Wilton to convey away somebody else's estate. It is said that if that is not the purpose of the Act, then the Act did not remove from the agreement the difficulty under which it suffered of being an agreement which Lord Wilton as a trustee could not properly enter into, because it was an agreement by him to sell at a price to be fixed, not by himself, but by somebody else. Two propositions are, I think, established by the authorities—first, that it would be a breach of trust for the tenant for life of settled estates to delegate his authority and enter into an agreement to sell for a price to be fixed by somebody else. That was decided by *Peters* v. *Lewes and East Grinstead Ry. Co.* (1) Secondly, that in the case of local and personal Acts like the one in the present case the rights of persons who are not what may be called parties to the Act are not to be bound unless the Court is obliged to hold that they are so bound by necessary implication. I will take as an example of what is not considered necessary implication *Lucy* v. *Levington* (2), in which, it was said, "Every man is so far party to a private Act of Parliament, as not to gainsay it, but not so as to give up his interest; 'tis the great question in *Barrington's case*, 8 Co. The matter of the Act there directs it to be between the forresters and the proprietors of the soil; and therefore it shall not extend to the commoners, to take away their common. Suppose an Act says, Whereas there is a controversy concerning land between A. and B. 'tis enacted, that A. shall enjoy it. This does not bind others, tho' there be no saving, because it was only intended to end the difference between them two." That is a clear example of a case in which there is no necessary implication to lead to the conclusion that persons who are not parties to the Act are bound; inasmuch as the Act means that A. shall only enjoy the land as between himself and B.

(1) 16 Ch. D. 703; 18 Ch. D. 429. (2) 1 Vent. 175. 176.

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It is recognized in *Dawson* v. *Paver* (1) by Wigram V.-C. that there may be a case in which even a private Act may, if no other construction can be given to it, by necessary implication affect the rights of third parties. What is the effect of this Act of Parliament? In the first place it is necessary to see what the agreement really means. [His Lordship referred to the agreement, and continued:—] Three things are clear from the terms of this agreement—first, that the vendor is contracting to sell as tenant for life under the Settled Land Acts, and the purchasers are contracting with him on that footing; secondly, that the parties to the contract contemplate that the award shall be binding, not only on them, but also on all the parties interested in the settled estates; and thirdly, that something was required beyond the sanction of Parliament to the purchase by the purchaser, for clause 19 provides that Parliament shall be asked also to authorize the vendor to carry the agreement into effect. That being the agreement which Parliament has sanctioned, I turn again to s. 19 of the Act, which confirms the agreement and makes it binding on the parties thereto. What is meant by saying that it is to be binding on the parties thereto? In my opinion that means that Lord Wilton, as tenant for life under the Settled Land Acts, and therefore as trustee, is bound to carry out the agreement. He cannot say that the agreement is a breach of trust and one which he cannot be forced to carry out. But it does not stop there. The section says that the agreement "shall and may be carried into effect accordingly." What is involved in that? To carry that out implies that Lord Wilton has contracted to sell as tenant for life, and that he can convey the fee simple. He cannot carry out the contract without doing that. By clause 4 of the agreement the arbitrators or the umpire are to make an award, and the terms are to be binding upon all the parties thereto and on all parties interested in the Wilton estates. If statutory effect is to be given to that clause the parties interested in the settled land cannot object to the price fixed by the arbitration. That is binding upon them. Without reference to authorities, it appears to me that I cannot give reasonable effect to s. 19 of the Act of 1904 unless I say that this agreement

(1) 5 Hare, 415.

is to be a binding agreement on the tenant for life, and must be carried out by him as tenant for life under the Settled Land Acts, with all the consequences which that involves. That conclusion is supported by the decision of Farwell J. in *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* (1) That case is not directly in point. It was an action between persons who might properly be called parties to the Act of Parliament, whereas in the present case all the persons interested in the estate were not parties to the Act. The defendants in that case argued that a clause of the agreement was void as exceeding the limits of the rule against perpetuities, and it was with that point that Farwell J. was dealing. He says this: "It has been argued that" the Act "merely gives the parties power to enter into the agreement, that is to say, it gives them a contracting capacity which they had not got before, irrespective of the terms contained in the particular contract. It appears to me that that would lead to a somewhat extraordinary result. If the Legislature has given the parties merely a right to enter into the contract and the contract is one which is altogether void, the Legislature has solemnly empowered them to enter into a contract which is void. That is a reductio ad absurdum. I cannot impute that intention to the Legislature. I think when the Act of Parliament confirms the scheduled agreement and declares it to be valid and binding upon the parties, it means what it says and gives it validity." Then he goes on: "A second suggestion was that, though the agreement as a whole is valid, there may be an invalid clause or two which the Legislature has overlooked, and that sufficient effect is given to the declaration of validity if the majority of the clauses are held valid. That is an argument which I am wholly unable to accept. When the Legislature declares an agreement valid, it is valid in toto, and I am not at liberty to hold it partly invalid."

It appears to me that those words are to some extent applicable here, because on that authority it may be said that if this agreement is to be carried into effect it must be carried into effect in toto. That case went to the Court of Appeal, and Vaughan Williams L.J. put the case somewhat more strongly than

(1) [1900] 2 Ch. 352, 359.

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Farwell J. had done. He says (1): "First it was urged before us that the agreement in clause 3 was void for remoteness or uncertainty. We think, for the reasons given by Farwell J., that every clause of the agreement has statutory validity, and that no objection can be taken on that score."

That is not strictly in point, as I have already said, because in that case the parties to the agreement were also parties to the Act of Parliament, for the agreement was expressly made binding on them, but it throws some light on the way in which the Court has to approach a case where the sanction to an agreement has been given by an Act of Parliament. I think the agreement must be carried out with all its consequences.

Solicitors: *Grover, Humphreys & Co.; Ernest Bevir; Foster & De Gex.*

H. C. R.

WARRINGTON J.
1906
Nov. 16.

In re CHALINDER & HERINGTON, SOLICITORS.

Practice—Solicitor—Costs—Taxation—Will—Trustee—Power to charge for professional Services—"Professional and other Charges for his Time and Trouble"—Non-professional Services.

To entitle a solicitor trustee, acting as solicitor to the trust estate under a direction to that effect in a will, to charge against the estate for work done by him, which, although not professional work, he could have charged for without any special bargain against a client who was not a trustee, there must be express words in the will shewing that such was the testator's intention.

A testator appointed executors and trustees, and directod that one of them should be the solicitor to his trust property and should be allowed "all professional and other charges for his time and trouble," notwithstanding his being an executor and trustee:—

Held, that this clause did not authorize the solicitor trustee to charge for work which was not professional work, although it was such work as he might have charged for against a client who was not a trustee.

SUMMONS to review taxation.

J. L. Lambert, by his will dated October 14, 1902, appointed his wife and two daughters, Edward Chalinder, a solicitor, and F. Williams, a bank manager, executors and trustees thereof,

(1) [1901] 2 Ch. 37, 50.

and he gave to Chalinder and Williams each a legacy of 150*l.* free of legacy duty provided that they acted as his executors and trustees, such legacies respectively to be paid by instalments of 15*l.* half-yearly during the time which or any part of which they should so act. The testator then proceeded to dispose of his property, and the last clause of his will was as follows: "I direct that my executor and trustee Edward Chalinder shall be the solicitor to my trust property and shall be allowed all professional and other charges for his time and trouble notwithstanding his being such executor and trustee."

The testator died on April 14, 1903, and probate of his will was granted to his executors on June 11, 1903. Mr. Chalinder acted as solicitor to the estate and delivered bills of costs to the trustees. These bills were taxed, and the beneficiaries under the will delivered objections to the taxation on the ground that the taxing Master had allowed items which represented charges for business transacted or work done by Mr. Chalinder or his firm capable of being transacted or done by the trustees personally and not requiring the employment of a solicitor for the transaction or doing thereof; and they contended that the will did not authorize Mr. Chalinder to charge for such business. The taxing Master in his answer stated that all the items objected to and allowed related to work which would be proper professional work to be done by Mr. Chalinder and charged for against a client who was not a trustee, and could be charged against the client personally even if he were a trustee, although they could not, apart from special powers, be charged against the trust estate. He was therefore of opinion that the charges for these items were authorized by the clause in the will.

The beneficiaries took out this summons asking that their objections might be allowed.

Norton, K.C., and *A. Whitaker*, for the summons. The items which we contend ought not to be allowed relate to work which was not professional work. That Mr. Chalinder might have charged for them against a client who was not a trustee is immaterial. The test is that he could not charge for them against a trustee client and get them paid out of the trust estate.

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He is a trustee, and can make no charges except those which are authorized by the will; and the testator has only said that he may charge for professional work as solicitor. The words "and other" refer to work such as keeping accounts and attending at banks and auctions, which, although not strictly professional, is often done, and properly done, by solicitors. We do not object to charges of that kind, but we contend that the words "for his time and trouble" do not mean his time and trouble as trustee: *Harbin* v. *Darby* (1); *In re Ames* (2); *In re Chapple* (3); *In re Fish* (4); *Clarkson* v. *Robinson*. (5) To enable a solicitor trustee to charge for non-professional work the enabling clause must contain words like those in form 62 in Wolstenholme's Forms and Precedents, 5th ed. p. 94, "including acts which a trustee not being in any profession or business could have done personally." We admit that the legacy given to Mr. Chalinder does not affect this question.

Clauson, for the solicitors. On the fair construction of this clause we are entitled to charge for all these items. They represent things which solicitors usually do, although if they are employed by trustees the trust estate could not be called upon to pay them. We do not ask to be paid for anything not done by Mr. Chalinder as a solicitor. We do not ask for remuneration as trustee. The clause was addressed to this very point, so as to enable us to get payment out of the estate for this work, which, but for the clause, could not thus be paid for. We could have charged for strictly professional work under a clause which did not contain the words "and other": *Harbin* v. *Darby*. (1) For the purposes of this case this clause is in as express terms as Mr. Wolstenholme's form. *In re Ames* (2) is in our favour. The only question is whether the charges were properly incurred. The Court will not read this clause as if it contained the words as to employment by the trustee or executor which were present in *In re Chapple*. (3) Our clause is as wide as that in *In re Fish* (4), where professional charges and charges for time and trouble are distinguished. The words "and other

(1) (1860) 28 Beav. 325.
(2) (1883) 25 Ch. D. 72.
(3) (1884) 27 Ch. D. 584.
(4) [1893] 2 Ch. 413.
(5) [1900] 2 Ch. 722.

charges for his time and trouble" mean charges for his time and trouble acting generally as solicitor to the trust property. If a man is employed as solicitor to an estate it is contemplated that he will do many things which are not strictly professional and charge for them. This clause enables Mr. Chalinder to charge for anything which a solicitor could, without any special bargain, charge against a client who was not a trustee.

No reply was called for.

WARRINGTON J. The question which I have to determine is whether one of the trustees of the will of the testator in this case, who is a solicitor, is entitled to be allowed, as against the trust estate, his charges for business transacted or work done by him and his firm which was capable of being transacted or done by a trustee personally and not requiring the employment of a solicitor. The question turns upon the construction of the clause in the testator's will which allows this particular solicitor to make charges. [His Lordship referred to the will, and continued:—] On the one side it is said that the clause means that Edward Chalinder shall be entitled to charge against the trust estate, and to be allowed, charges for everything he does in connection with the estate, whether the items of business transacted, or the work done, are things which a trustee not being a solicitor might do personally or not—whether they are things which, if a lay trustee had employed a solicitor to do, he, the lay trustee, would be allowed what he paid the solicitor, or not. On the other hand, it is said that this clause does not include such items of work done or business transacted as I have just mentioned. To put it in reference to matters with which we are most of us familiar, it is said by the persons interested in the estate that this clause does not allow a charge for business not strictly professional which might have been performed, or would necessarily have been performed in person by a trustee not being a solicitor. In my opinion the latter is the proper construction of this clause.

Now the clause starts with a direction that Mr. Chalinder "shall be the solicitor to my trust property." I think that is the governing consideration in approaching the construction of the clause. That by itself would not be enough, because,

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notwithstanding that the testator might direct that one of his trustees should be employed by the others as solicitor to the trust property, it would not follow that that solicitor would be entitled to charge if he was a trustee. The testator then goes on: "And shall be allowed all professional and other charges for his time and trouble notwithstanding his being such executor and trustee." In my opinion that last clause is nothing more than this, that the testator adds to the direction that Mr. Chalinder shall be the solicitor a direction that he shall be allowed his professional and other charges for his time and trouble as solicitor. I do not think that, to use the expression used by Lindley L.J. in the case *In re Fish* (1), under this clause Mr. Chalinder is entitled to charge not only for his professional services but for his trouble as a trustee. It is said that I cannot arrive at that conclusion without rejecting the words "and other charges for his time and trouble." I do not think I am driven to that alternative at all. It may well be that there may be charges for time and trouble as solicitor which may not be strictly professional charges; that is to say, there may be charges for business done, and properly done, by the person employed as solicitor to the trust estate which may yet not come strictly under the head of professional charges, such as advising, or drawing drafts, or things which a solicitor does in his strictly professional capacity. That seems to me to be the construction of the clause without reference to authority. Is there any authority which would justify me in interpreting this clause as meaning something more than that which, in the absence of authority, I should take it to mean? I do not think there is.

Perhaps the case that comes nearest to it in favour of the solicitor is *In re Ames.* (2) But when that case is looked at I think it is clear that the will went a great deal further than the will in the present case, and that the decision of North J. on the construction of that will in no way governs the Court on the construction of the will before me. The will there contained a very special clause indeed. After a full reimbursement clause applying to all the trustees generally, the testator there went on: "It shall be lawful for any of my said trustees and

(1) [1893] 2 Ch. 413, 420. (2) 25 Ch. D. 72.

executors who may be a solicitor to transact any business occasioned by the trusts, powers, or provisions of this my will, or otherwise connected with the getting in or management of my estate or effects, whether such business be usually within the business of a solicitor or not, and that he shall be allowed to make the usual professional or other proper and reasonable charges for all business done and time expended in relation thereto." Now what is "in relation thereto"? Surely "in relation thereto" can only mean transacting the business with the very wide words which follow, which would include every item of business, whether such as a trustee does personally or ought to do personally or not. That is the ground of North J.'s decision: there is nothing in this will in the least like the provisions in that will; and in my judgment that case is no authority at all in the present case.

In *In re Fish* (1), where the charges were also allowed, the clause in the will contained those words which seem to me to be all-important words: "Including all business of whatever kind not strictly professional, but which might have been performed, or would necessarily have been performed in person by a trustee not being a solicitor." It seems to me that in order to enable a solicitor trustee to obtain payment for work for which an ordinary trustee could neither be paid directly nor be allowed payments made to a solicitor, there must be words in the will which shew that that was the testator's intention. I can find no such words here, or any words to which I can give that interpretation. I think, therefore, the solicitor trustee in this case ought not to be allowed the charges mentioned in the objections to the taxing Master's taxation—that is to say, "Charges for business transacted or work done by the said Edward Chalinder or his firm capable of being transacted or done by the trustees personally and not requiring the employment of a solicitor for the transaction or doing thereof." With that expression of opinion it must go back to the taxing Master.

Solicitors: *Foulger, Robinson & Miller; Field, Roscoe & Co., for Chalinder & Herington, Hastings.*

(1) [1893] 2 Ch. 413.

H. C. R.

NEVILLE J.

1906

Oct. 30.

NOAKES *v.* NOAKES & CO., LIMITED.

[1906 N. 869.]

Brewery Company—Debenture Trust Deed—Mortgaged Licensed Premises—Non-renewal of Licence—Licensing Act, 1904 (4 *Edw.* 7, *c.* 23), *s.* 2—*Compensation — Capital Moneys — Investment — Powers of Debenture Trustees.*

A brewery company by deed conveyed all its licensed premises to trustees to secure an issue of debenture stock. The deed empowered the trustees to permit the company to hold and enjoy the mortgaged premises until the security became enforceable (which event had not happened), and provided (clause 20) that at any time before the security became enforceable the trustees might with the concurrence of the company sell, lease, and exchange any of the mortgaged premises, and also "settle, adjust, refer to arbitration, compromise and arrange all . . . . controversies, questions, claims and demands whatsoever, open, unsettled or pending with any person or persons in relation to the mortgaged premises," and also generally might "act in relation to the mortgaged premises in such manner as the trustees might think expedient in the interests of the stockholders"; and declared (clause 21) that the trustees should hold "all capital moneys arising under clause 20" upon trust for investment in (inter alia) other licensed premises. The deed also contained the usual trust investment clause. The licensing authority having refused under the powers of the Licensing Act, 1904, to renew the licence of one of the licensed premises comprised in the trust deed, compensation was awarded under the Act to the company in respect thereof. The trustees were not parties to the compensation proceedings :—

Held (following *Law Guarantee and Trust Society, Ld.* v. *Mitcham and Cheam Brewery Co., Ld.*, [1906] 2 Ch. 98), that the compensation money must be paid to the trustees of the debenture deed.

Held also, that the compensation proceedings were a "controversy in relation to the mortgaged premises" within the meaning of clause 20, and, therefore, that the compensation moneys were "capital moneys arising under clause 20" which the trustees could in the exercise of their discretion apply under clause 21 in the purchase of other licensed premises.

Adjourned Summons.

The defendants were a brewery company, and in March, 1897, they executed a debenture trust deed whereby they conveyed all their freehold and leasehold licensed premises to trustees as security for a debenture stock issue of 300,000*l.*, and

also charged all their other property and assets for the time being as a floating security for the payment of all moneys for the time being owing under the deed. Clause 12 of the deed provided that the trustees should permit the company to hold and enjoy all the mortgaged premises until the security should become enforceable (which event had not happened). Clause 13 specified the events in which the security should become enforceable. Clause 20 provided that at any time before the security became enforceable the trustees might, upon the application and at the expense of the company, sell, lease, and exchange any of the mortgaged premises in manner therein mentioned, and also contained sub-clauses in the following terms:—"(7.) may settle adjust refer to arbitration compromise and arrange all accounts reckonings controversies questions claims and demands whatsoever open unsettled or pending with any person or persons in relation to the mortgaged premises. . . . . (9.) generally may act in relation to the mortgaged premises in such manner as the trustees may think expedient in the interests of the stockholders." Clause 21 directed that the trustees should hold all net capital moneys arising under clause 20 upon trust to lay out the same or any part thereof if they should think fit in, amongst other things, the purchase of any freehold or leasehold licensed premises convenient for the purposes of the company; and clause 25 was the usual trust investment clause.

In 1905 the licensing authority, under the powers of the Licensing Act, 1904, refused to renew the licence of one of the leasehold public-houses of the company, known as the Swan Inn in Camberwell, and the compensation authority under the rules made under the Act awarded 3433*l.* in respect of the premises for non-renewal of the licence, of which sum 2813*l.* was payable to the company, 420*l.* to the superior landlord, and 200*l.* to the licensee. The trustees of the debenture deed were not the registered owners of the premises and sent in no claim under the rules to be treated as persons interested in the licensed premises, but, by arrangement with the company, left it to the latter to put forward the claim for compensation. The plaintiffs were the present trustees of the debenture trust

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deed, and the questions raised by the present application were: (1.) whether the 2813*l.*, which the company had received, was payable to the plaintiffs as part of the mortgaged premises; (2.) and, if so, whether the plaintiffs could in the exercise of their discretion under clauses 20 and 21 of the deed invest it in the purchase of other licensed premises convenient for the purposes of the company.

The deed and the clauses above stated were common form, and the present application was a test case, there being several other licensed premises included in the trust deed in respect of which claims for compensation were pending in consequence of the licences not having been renewed under the Act.

Jenkins, K.C., and *C. Bathurst*, for the plaintiffs. Having regard to the recent decision of Kekewich J., in the case of *Law Guarantee and Trust Society, Ld.* v. *Mitcham and Cheam Brewery Co., Ld.* (1), it seems clear that the 2813*l.* represents part of the mortgaged premises and must be paid over to the trustees of the debenture deed and not retained by the company.

P. B. Abraham, for the company. I cannot now resist that payment.

NEVILLE J. That disposes of the first point.

Jenkins, K.C. The second point is whether the trustees are bound to invest the money in ordinary trust investments. Kekewich J., in the case before him, decided that that must be done, but the trustees here have much wider powers than in that case. It is submitted that the question of compensation was a matter arising "in relation to the mortgaged premises" within the meaning of sub-clauses 7 and 9 of clause 20 of the deed, and that the trustees could deal with it and could arrange with the company to put forward the claim. If that is so, then the 2813*l.* is "capital moneys" coming to their hands under clause 20 which under clause 21 they can, if they think fit, invest in other licensed premises.

P. B. Abraham, for the company.

(1) [1906] 2 Ch. 98, 104.

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NEVILLE J. As a matter of fact a question did arise as to the amount of compensation to be paid in respect of the licensed premises in consequence of the non-renewal of the licence. In my opinion that was a "controversy in relation to the mortgaged premises"—it matters not how it arose—within the meaning of sub-clauses 7 and 9 of clause 20 of the trust deed, and the trustees can under clause 21 apply the 2813*l.* as capital moneys arising under clause 20, and can in the exercise of their discretion invest it in other licensed premises convenient for the purposes of the company.

Solicitors for all parties: *Knapp-Fisher & Sons.*

H. L. F.

NEVILLE J. 1906 *Nov.* 6.

In re PIZZI.

SCRIVENER *v.* ALDRIDGE.

[1905 P. 2671.]

Expenses of paving Street—Charge on Premises—Payment by Tenant for Life—Private Street Works Act, 1892 (55 & 56 *Vict. c.* 57), *ss.* 13, 17—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 257—*Settled Land—Incumbrance—Discharge—Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 11.

A person entitled to the interest of a tenant for life in certain property paid the expenses incurred by a local authority in paving a private street, and charged upon the property under s. 13 of the Private Streets Works Act, 1892:—

Held, that he was entitled to a charge for the capital moneys so paid under s. 13, which gives an absolute charge on the fee simple, notwithstanding the fact that s. 17 of the same Act gives limited owners a power to raise moneys so paid by mortgage on the terms that the capital shall be repaid by instalments within twenty years.

JOSEPH ANTONIO PIZZI, who died on August 7, 1883, by his will devised certain freehold messuages in Albert Street and Queen Street, Great Warley, in the county of Essex, and all his residuary estate to the use of his wife Emma Pizzi for the term of her natural life, and he directed that upon the decease of his said wife his daughter Jane Pizzi Aldridge should come into possession for her natural life, and in the event of her decease

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her husband, Charles Edwin Aldridge, should receive and enjoy the same for his natural life, and on his death the whole should be sold and the proceeds invested in Bank of England stock and held by any executors whom the said C. E. Aldridge should appoint in trust for the children of Jane Pizzi Aldridge and C. E. Aldridge in equal shares upon their attaining the age of twenty-one years.

On April 14, 1884, Jane Pizzi Aldridge and her husband mortgaged their reversionary life interests in the said houses to Catherine Morell for 200*l.*; on June 27, 1898, they further mortgaged their reversionary life interests to James Venning for 50*l.* By an indenture dated September 28, 1898, and made between the said Jane Pizzi Aldridge of the first part, the said C. E. Aldridge of the second part, and the Greater London Property Company, Limited, of the third part, Jane Pizzi Aldridge demised the said freehold houses to the said company for ninety-nine years from the death of the said Emma Pizzi by way of mortgage to secure 150*l.* and interest. In the years 1899 and 1900 the company took transfers to themselves of the prior mortgages for 200*l.* and 50*l.*

In the year 1900 or thereabouts the Romford Rural District Council did some paving and other works to the streets known as Albert Street and Queen Street aforesaid under the powers given them by the Private Street Works Act, 1892, and charged the expenses against the owners of land abutting on the streets. The final apportionment of expenses was made as to Albert Street on September 15, 1902, and as to Queen Street on November 6, 1902, and thereby the sum of 34*l.* 2*s.* 6*d.* was apportioned to the testator's houses in Albert Street and the sum of 50*l.* 5*s.* 4*d.* to his houses in Queen Street.

On January 18, 1905, the company paid to the district council the sums so apportioned with interest to date, making up 37*l.* 0*s.* 10*d.* for the Albert Street houses and 54*l.* 9*s.* 6*d.* for the Queen Street houses. The company, in exercise of powers of sale contained in the mortgages transferred to them, sold and conveyed to the plaintiffs the life interests of the said Jane Pizzi Aldridge and C. E. Aldridge under the testator's will freed from all equity of redemption, and also assigned to the plaintiffs all

the right, claim and interest of the company in the said sums of 37*l.* 0*s.* 10*d.* and 54*l.* 9*s.* 6*d.* paid by them to the district council as aforesaid.

Emma Pizzi, the testator's wife, had died on March 15, 1903.

This summons was taken out by the plaintiffs as assignees of the life interest of Jane Pizzi Aldridge, asking that the sums so paid by the company to the rural district council might be declared to be a charge on the capital of the testator's estate in the said houses with interest at 4 per cent. from the date of payment, and that the same might be raised and paid accordingly.

The whole question turned on the construction of ss. 13 and 17 of the Private Street Works Act, 1892 (55 & 56 Vict. c. 57). (1)

E. Ford, for the summons. Sect. 13 of the Private Street Works Act, 1892, gives the local authority the same charge on the property that they would have had under s. 257 of the Public Health Act, 1875. *Birmingham Corporation* v. *Baker* (2) shews that the charge given by that section is a charge on the fee, and *In re Smith's Settled Estates* (3) shews that a tenant for

(1) The Private Street Works Act, 1892, s. 13 (1.): "Any premises included in the final apportionment, and all estates and interests from time to time therein, shall stand and remain charged (to the like extent and effect as under section two hundred and fifty-seven of the Public Health Act, 1875) with the sum finally apportioned on them, or if objection has been made against the final apportionment with the sum determined to be due as from the date of the final apportionment, with interest at the rate of four pounds per centum per annum, and the urban authority shall, for the recovery of such sum and interest, have all the same powers and remedies under the Conveyancing and Law of Property Act, 1881, and otherwise as if they were mortgagees having powers of sale and lease and of appointing a receiver." Sect. 17: "All owners of buildings or lands, being persons who under the Lands Clauses Acts are empowered to sell and convey or release lands, may charge such buildings or lands with such sum as may be necessary to defray the whole or any part of any expenses which the owners of or any persons in respect of such buildings or lands for the time being are liable to pay under this Act and the expenses of making such charge, and for securing the repayment of such sum with interest may mortgage such buildings or lands to any person advancing such sum, but so that the principal due on any such mortgage shall be repaid by equal yearly or half-yearly payments within twenty years."

(2) (1881) 17 Ch. D. 782.

(3) [1901] 1 Ch. 689.

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life who pays the charge stands in the place of the local authority, and has a right to have the charge raised and paid under the Settled Land Acts. Sect. 17 of the Private Street Works Act, 1892, gives limited owners a special power of raising money to pay these charges; it does not deprive them of the charge given by s. 13.

Pritchett, for the persons entitled in remainder. Sect. 17 of the Private Street Works Act, 1892, gives a tenant for life or other limited owner a power to raise money for paying these charges by a mortgage providing for payment by instalments within twenty years. That exhausts the remedies of the tenant for life as between him and the remainderman. If he had already a much better security, in the shape of a charge on the fee simple under s. 13, it is inconceivable that the Legislature would have given him a useless and inconsistent remedy. There is nothing in s. 257 of the Public Health Act, 1875, to put a person paying off the charge in the same position as the public authority. *In re Smith's Settled Estates* (1) does not decide that the charge vested in the tenant for life, but only that it was an incumbrance in the estate which the tenant for life had a right to have raised and paid under the Settled Land Act, 1890. *Birmingham Corporation* v. *Baker* (2) shews that it is necessary to come to the Court for a declaration of charge under the Public Health Act, 1875. Sect. 17 enables the tenant for life to raise money without coming to the Court. In any case the tenant for life cannot claim interest; it was his duty to keep down interest.

[*E. Ford* said he should not claim interest.]

NEVILLE J. This summons raises rather a curious point in the construction of ss. 13 and 17 of the Private Street Works Act, 1892. [His Lordship read s. 13, and continued:—] Sect. 257 of the Public Health Act, 1875, which is there referred to, gives the public authority a charge on the property, and it is settled that that is a charge on the fee simple. In *In re Smith's Settled Estates* (1) Buckley J. held that a tenant for life who had paid the money to the public authority was entitled to the charge,

(1) [1901] 1 Ch. 689. (2) 17 Ch. D. 782.

and could raise money to pay it off under s. 11 of the Settled Land Act, 1890. Presumably a tenant for life would be in the same position in respect of a charge under the Private Street Works Act, s. 13. But by s. 17 the Act makes a special provision for limited owners raising the moneys, different from the provisions of the Public Health Act. [His Lordship read s. 17.]

It has been accurately pointed out that a mortgage under that Act is not so favourable for the tenant for life as a charge under the Public Health Act; and it is argued that s. 17 exhausts the powers of the tenant for life and prevents his acquiring, by payment, the charge under the Public Health Act which he would have acquired under s. 13 if it had stood alone. I do not think that was the intention of the Legislature. I think s. 17 was intended to meet the case where a tenant for life or other limited owner wanted to raise money to pay a charge which he was not willing to pay out of his own pocket, not to deprive him of the charge which he would have had by virtue of s. 13 when he chose to pay the money himself.

There must be a declaration that there is a charge, but it must be confined to the capital sums paid. The costs of both parties of this summons may be added to the charge.

Solicitors: *Charles Richard Taylor; J. Davis, for East & Smith, Birmingham.*

J. R. B.

Followed. Re BARNATO, [1949] 1 Ch. 21. [1949] 1 Ch. 21

NEVILLE J.

1906

Nov. 6.

In re KING.

MELLOR *v.* SOUTH AUSTRALIAN LAND MORTGAGE AND AGENCY COMPANY.

[1906 K. 546.]

Administration—Contingent Future Liabilities—Return of Assets—Rights of Future Creditor—Distribution—Practice—Parties—Rules of Supreme Court, Order LV., *r.* 3, *sub-ss.* (*e*), (*g*); *r.* 5.

The executors of a testator whose estate comprised shares of 10*l.* each in a limited company, of which only 4*l.* had been called up, took out a summons for a declaration that they were entitled to distribute the estate among the residuary legatees notwithstanding the possible future liability on the shares. The beneficiaries and the company were made defendants:—

Held—(1.) that the company could not be brought before the Court adversely on such a question, and the summons as against them must be dismissed with costs; (2.) that it is not the practice of the Court to retain funds in Court for the protection of a contingent future creditor, and it is unnecessary to do so for the protection of the executors, for they are sufficiently protected by the order of the Court in the administration of an estate.

Semble, such an order would not protect the executor unless made in the administration of the estate. The summons was therefore ordered to stand over for an inquiry as to debts and legacies. The cases as to retainer of assets and indemnity to executors examined.

MARY KING, the testatrix, who died on November 17, 1904, by her will dated March 19, 1900, appointed executors, and devised and bequeathed all her residuary real and personal estate to such of her sisters as should be living at her death, and the children or child then living of any of her sisters who should be then dead in equal shares as tenants in common per stirpes.

The testatrix's estate comprised 524 shares of 10*l.* each in the South Australian Land Mortgage and Agency Company, Limited, upon which 4*l.* only was paid up, leaving a gross liability for calls which might thereafter be made of 3144*l.* Apart from these shares the estate was valued at about 10,000*l.*

The shares were stated to be of no value. The executors had requested the company to register transfers to the several

beneficiaries, who were all sui juris, but the directors, who had an absolute power to refuse to register transfers, had refused.

The executors then took out this summons, asking for a declaration that they were entitled to distribute amongst the persons beneficially entitled under the testatrix's will the estate of the testatrix, notwithstanding the liability of the estate in respect of the uncalled capital on the said 524 shares, upon the persons so entitled severally undertaking to refund the whole or such part (if any) of the estate paid or transferred to them as the Court might direct for the purpose of answering any debt which the defendant company might thereafter establish in respect of the said liability.

The company and all the beneficiaries were made defendants.

On the summons coming on for hearing,

Clauson, for the company, took the preliminary objection that the company were improperly made defendants.

Jenkins, *K.C.*, and *Mansfield*, for the plaintiffs. The summons is taken out under the Rules of the Supreme Court, Order LV., r. 3 (*e*), "Directing the executors or trustees to do . . . . any particular act," and (*g*) "The determination of any question arising in the administration of the trust." Rule 5 directs that the persons to be served where the summons is taken out under these sub-sections shall be "the persons, or one of the persons, whose rights or interests are sought to be affected." The rights of the company will be affected by the order asked for. If the executors distributed the assets without the order of the Court, the company could sue the executors and through them recover from the beneficiaries, or sue the executors for a devastavit. It is the practice of the Court to bring the persons entitled to a future claim before the Court in order that the Court may have full information. The company could not get an administration order, or, as of right, have the fund impounded, but they are within the words of the rule and properly brought here. If they had not been served the Court would have directed that they should be communicated with. We do not dispute that they may be entitled to their costs.

Clauson, for the company. It is settled that these rules do

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not give the Court any new jurisdiction. Therefore r. 5 must be construed as meaning persons whose rights are sought to be affected who could be properly brought before the Court in an administration action. There is no authority for making a person who has only a future and contingent claim on the estate a party to an administration action. Such persons may come in voluntarily, but *King* v. *Malcott* (1) shews that they have no right to ask the Court to impound the fund. It is premature to discuss the effect of the order, but persons cannot be brought here adversely that an order may be made in their presence which they have no right to oppose.

Jenkins, K.C., in reply.

NEVILLE J. I think that this is a case of some little importance because it is one that may constantly recur. The question is this: A company, the shares of which are not fully paid up, has upon its register a testatrix who has died leaving executors, and the prospective liability upon the shares being still unsatisfied, and the estate being in the course of administration, the executors apply on summons to the Court seeking directions with regard to the distribution of the estate notwithstanding the existence of this possible future claim on the part of the company. That summons is served upon the company with a view of bringing them before the Court in order that they may be present upon the directions given by the Court with regard to the distribution by the executors. It is said that that course is a proper and effective course, upon the authority of the Rules of Court, Order LV., r. 3, which provides for an application by the executors or administrators of a deceased person, directing the executors or administrators or trustees to do or abstain from doing any particular act in their character as such executors or administrators or trustees (sub-s. (*e*)). This, I think, clearly is an application for a direction with regard to the doing of a particular act or abstaining from doing a particular act in the character of the applicants as executors. By r. 5 of the same order the persons to be served with the summons under the last two preceding rules in the first instance are to be the following:

(1) (1852) 9 Hare, 692.

"in the case of sub-s. (*e*) of r. 3 the persons, or one of the persons, whose rights or interests are sought to be affected." It is said that the rights and interests of the company are sought to be affected by the direction asked, and no doubt in a certain sense that may be the case. But, as Mr. Clauson has pointed out, and there is no doubt about it, the jurisdiction of the Court has not been enlarged by the making of the rules, under which a simpler form of procedure is now possible than was formerly in vogue, and no case can be shewn deciding that a person with a possible future claim is a proper party to litigation in respect of the administration of a testator's or an intestate's estates. Mr. Clauson has referred me to the case of *King* v. *Malcott.* (1) In that case a lessor claimed administration of his lessee's estate, and asked to have impounded a certain amount to meet liability for future rent; and the Vice-Chancellor dismissed the application, and used language which shews clearly that a person in such a position—and I think that position is analogous to that held by Mr. Clauson's clients here—has not any right which is enforceable either at law or in equity. If that is so it seems to me that they are not proper parties to litigation in respect of the administration of their possible debtor's estate as defendants. I think, therefore, that, inasmuch as they could not in my opinion be made defendants to an administration action before the rules, they cannot be served with an originating summons after the rules, and so be brought before the Court. In my opinion they were improperly served, and they must be dismissed from the proceedings with costs.

The case was then heard on its merits.

Jenkins, K.C., and *Mansfield*, for the executors. The executors do not ask that any fund should be retained as an indemnity. The beneficiaries have offered a personal indemnity, and the executors have accepted it.

Austen-Cartmell, for some of the residuary legatees. It is not now the practice to retain any part of the assets as an indemnity for the executor, for he is sufficiently protected by the order of

(1) 9 Hare, 692.

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the Court (Carson's Real Property Statutes, p. 532, note to Law of Property Amendment Act, 1859 (Lord St. Leonards' Act), 22 & 23 Vict. c. 35, s. 27, where he quotes *Dodson* v. *Sammell*). (1) By distributing the fund the Court is not really interfering with the rights of a future creditor, because an executor would always distribute the fund under an order and be protected: *Dean* v. *Allen*. (2) The Court has always assumed jurisdiction to distribute the fund without regard to the rights of any future creditor. It is true that in *Fletcher* v. *Stevenson* (3) Wigram V.-C. states that the retainer of a fund as an indemnity was for the protection of the future creditor, but that principle has not been followed: see *Waller* v. *Barrett* (4); *Smith* v. *Smith* (5); *Dodson* v. *Sammell*. (1) In all these cases the only point discussed was the right of the executor to an indemnity. In *In re Nixon* (6) Byrne J. went through all the cases, and explained that an indemnity was never required unless the executor was under a personal liability by reason of privity of estate with a lessor. It may be that an order of the Court only protects him from liability qua executor. The reported cases are all on liabilities under leases, but there is no difference in principle between liability under a lease and the liability in the present case, which is made a specialty debt by the Companies Act. If the Court were to retain a fund for the protection of a future creditor, it would be giving him mero motu a protection which it would refuse if he came to ask for it: *King* v. *Malcott*. (7)

Waggett, for other residuary legatees.

NEVILLE J. In this case the executors seek the direction of the Court to distribute the estate among the residuary legatees notwithstanding the claim of a limited company in respect of unpaid shares, no calls having been made. It appears to be the practice to direct such distribution notwithstanding the existence of contingent claims, and, as the law stands, I think it is clear that the order of the Court in such a case exonerates the

(1) (1861) 1 Dr. & Sm. 575.
(2) (1855) 20 Beav. 1.
(3) (1844) 3 Hare, 360.
(4) (1857) 24 Beav. 413.
(5) (1861) 1 Dr. & Sm. 384.
(6) [1904] 1 Ch. 638.
(7) 9 Hare, 692.

executors from ultimate liability to the creditor. The practice appears to have grown up gradually and in a manner which is not to my mind altogether satisfactory. One cannot help seeing that the rights of absent parties of whose claim the Court has notice may be prejudicially affected by the order. Nor are the authorities themselves in a very satisfactory state, but I think the outcome is reasonably clear.

The first case I have been referred to is *Fletcher* v. *Stevenson* (1), before Wigram V.-C. In that case the Vice-Chancellor directed that the whole of the residuary estate of the testator and the income should be retained for the purpose of providing a fund to satisfy, if necessary, future claims for rent. The Vice-Chancellor says this (2): "The widow's claim is opposed by two parties, first, by the executor: and, secondly, by the legatees in remainder. So far as the executor is personally concerned, he would, I apprehend, be safe in acting under the direction of the Court; but in considering what degree of protection is due to the absent covenantee, I am bound to consider whether the Court, taking the fund out of the hands of the executor, can do less than it would expect the executor to do if the fund remained in his hands." That is the ground on which the Vice-Chancellor refused to part with the fund, and I must say that what the Vice-Chancellor says seems to me of very great force. The next case cited in which the matter came before the Court is *Dean* v. *Allen*. (3) The side-note is: "Where an estate is administered and the residue is paid over under an order of the Court, the executor will be protected, and a creditor will not afterwards be allowed to sue him at law. The executors of a lessee held entitled to no further indemnity against the covenants than the personal indemnity of the residuary legatees." That case is a clear authority upon the point that the direction of the Court exonerates the executors from liability to the creditor, but it is not very satisfactory because it provides for indemnity to the trustees, and does not point out or apparently recognize any inconsistency between the doctrine that the executors are entirely

(1) 3 Hare, 360. (2) 3 Hare, 370.

(3) 20 Beav. 1.

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exonerated from liability and the provision of indemnity for them. The point again came before Sir John Romilly in *Waller* v. *Barrett* (1), and there the Master of the Rolls gives reasons for what he states to be the practice which are at all events intelligible. He reiterates the doctrine of exoneration. [His Lordship read the head-note to that case, and continued:—] The Master of the Rolls says (2): "I am at a loss to conceive on what principle a debt which may arise hereafter, but which is not now existing, is to be treated on a footing different to an existing debt. The creditor, although advertised for, may be abroad at the time, he may be ignorant of the whole proceedings, and yet, if he do not come in and claim, his only remedy in this Court is against the legatees. In the case of *March* v. *Russell* (3), Lord Cottenham made this observation: 'Formerly, when legacies were paid, it seems to have been the practice to oblige the legatee to give security to refund, in case any other debts were discovered. That practice has been discontinued, but the legatee's liability to refund remains. The creditor has not the same security for the refunding as when the legatee was obliged to give security for that purpose, but he has the personal liability of the legatee.' I hold that this, in fact, is the principle which governs these cases, that it is for the purpose of giving a greater degree of security to the executor (in case a creditor should arise thereafter), that the Court requires what is called 'an indemnity to the executor' to be given; but if he has stated the facts to the Court, and has acted under its direction, I apprehend that his indemnity is complete and perfect, so far as he is concerned."

That is an intelligible account of the origin of the practice. I am surprised that Lord Romilly should have professed himself to be at a loss to conceive on what principle a contingent debt can be differentiated from an existing debt, but he does class the two together and declare that the order of the Court exonerates the executor on distribution of the assets. Further, one cannot help feeling that the reason given for the provision of the indemnity is unsatisfactory, because it is curious that an indemnity of this kind should be held to give a greater

(1) 24 Beav. 413. (2) 24 Beav. 418.
(3) (1837) 3 My. & Cr. 31, 41.

degree of security to the executor than the order of the Court, which exonerates him altogether. However, there it is, and that is something upon which one can proceed, whether the grounds upon which it is founded, as stated by the learned judge, commend themselves to one's ideas of the general practice of the Court or not.

The next two cases to which I was referred are both before Kindersley V.-C. In the first, *Smith* v. *Smith* (1), the doctrine of exoneration was referred to, and it was held the executors were not in that case entitled to an indemnity, and the Vice-Chancellor says (2): "Supposing there had been no dealing with the leaseholds by the executors, would they have been now entitled to any indemnity? In following the previous decisions, I have held that executors have such right; but I concur with the Master of the Rolls in thinking that where an executor fairly represents everything to the Court the decree, directing him to deal with and distribute the property, must operate as a complete indemnity to him; and that therefore an executor cannot need any other indemnity. It has, however, been suggested, that there ought to be a fund set apart by way of indemnity, not for the benefit of the executor, but for the benefit of the lessor, in case of there being at any future time a breach of covenant. Now if the lessor is entitled to any such equity as this, it would seem to follow that he might come to this Court to assert such equity, and to ask the Court to set apart a sum of money out of the testator's assets, to provide for the event of a future breach of covenant, for which he might be entitled to recover damages. But it has been held that a lessor cannot be heard in this Court to maintain any such right. In truth the whole doctrine on the subject is in a very unsatisfactory state; and does not seem to be founded on sound principles." The case came again before the same Vice-Chancellor in *Dodson* v. *Sammell*. (3) In that case a fund which had been set apart to indemnify executors was ordered to be paid out to the residuary legatee, such indemnity since the passing of Lord St. Leonards'

(1) 1 Dr. & Sm. 384. (2) 1 Dr. & Sm. 387.
(3) 1 Dr. & Sm. 575.

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Act (22 & 23 Vict. c. 35) being no longer necessary as a protection to the executor. The Vice-Chancellor said (1): "With respect to the other ground, that it is required for the benefit of the lessor, it is true that in *Fletcher* v. *Stevenson* (2), Wigram V.-C. thought that although the decree of the Court would be a sufficient indemnity to the executor, it was right to set apart a sufficie part of the assets for the protection of the covenantee; meaning, of course, that the covenantee had that equity. Now if the covenantee had such an equity, it would necessarily follow that he could file a bill to enforce it. But in *King* v. *Malcott* (3) Turner V.-C. decided that there was no such equity." With great respect, I venture to think that the inference which the learned Vice-Chancellor draws in that case is not a necessary inference, and that the reason given by Wigram V.-C. for retaining a security for the contingent creditor was an intelligible reason which was not open to the observation made by Kindersley V.-C. in that case. However, from that time on it seems to have been the practice not to retain any part of the assets. Then after a considerable number of years—I have not been referred to any case decided between 1861 and 1904—the case came before the late Byrne J. in *In re Nixon.* (4) The head-note in that case is, "On making an order for the distribution of the estate of a testator amongst his residuary legatees the Court will not set aside any part of his assets to indemnify his executors against possible liabilities which may arise in respect of leases formerly held by him, unless there is privity of estate between the executors and the lessors." That I understand to apply to all cases where there is not a personal liability on the part of the executors to pay out of their own moneys the claim of the creditor. The learned judge went through the cases and came to the conclusion stated in the head-note, and I think that, having regard to the authorities, it is necessary for me to proceed on the same footing.

It is pointed out in one of the cases that the exoneration must, or at all events may, only operate in the case of an administration action. There may be a distinction in the protection

(1) 1 Dr. & Sm. 578.
(2) 3 Hare, 360.
(3) 9 Hare, 692.
(4) [1904] 1 Ch. 638.

afforded by a direction of the Court taken under Order LV., r. 3, without administration. It is obvious that the Court cannot direct distribution of the estate so long as it is not satisfied that there are no longer any immediate claims outstanding. I think, therefore, there should be an inquiry as to debts.

The order made directed an inquiry as to debts and pecuniary legacies, and which of them had been paid, and referred the summons back to chambers, with leave to amend and liberty to apply.

Solicitors: *Sims & Syms; Freshfields; H. H. Price; Biddle & Co.*

J. R. B.

ATTORNEY-GENERAL *v.* MERSEY RAILWAY COMPANY.

C. A.
1906
Nov. 7, 8, 9; *Dec.* 4, 14.

[1905 A. 1836.]

Railway Company—Omnibus Service—Incidental Powers—Ultra Vires.

A railway company owned a railway which ran from Liverpool to Birkenhead. For the convenience of passengers and intending passengers by the railway the company provided a service of motor omnibuses running between their Central Station at Birkenhead and the residential part of the town. They ran these omnibuses exclusively to and from the station in connection with their train service, but they picked up passengers on the way and carried them for any distance they pleased on the line of route, and charged separate fares for journeys between intermediate stopping places. The company had no express power under their special Acts to run omnibuses. In an action by the Attorney-General at the relation of the corporation of Birkenhead Warrington J. granted an injunction restraining the railway company from carrying on the business of omnibus proprietors in Birkenhead:—

Held (Buckley L.J. dissenting), that the omnibus business as carried on by the company was not incidental to the undertaking of the railway and was ultra vires; but, the defendants undertaking (1.) to run their omnibuses exclusively to or from a railway station on their line and in connection with their trains, and not to hold themselves out as carrying on a general omnibus business, (2.) not to charge separate fares for intermediate journeys, and (3.) as far as practicable to confine their omnibus service to passengers to or from a station on their line, the Court discharged the injunction.

APPEAL from a decision of Warrington J. (1)

The action was brought by the Attorney-General at the relation

(1) [1906] 1 Ch. 811.

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of the corporation of Birkenhead, and by the corporation, against the Mersey Railway Company, for a declaration that it was beyond the powers of the railway company to carry on the business of omnibus proprietors in the borough of Birkenhead, and for an injunction to restrain them from so doing. The defendant company owned and worked a railway which connected Liverpool and Birkenhead by means of a tunnel under the river Mersey. After passing beneath the river the railway ran into Hamilton Station in Birkenhead and then divided into two branches, one of which went north-west to Park Station and the other south-east to Central Station and then south to Green Lane and Rock Ferry Stations. All these stations were in the borough of Birkenhead. The traffic on their line was mainly a passenger traffic. The corporation owned and worked a ferry across the river Mersey, and they also owned and worked a system of electric tramways in the borough of Birkenhead. These tramways connected the riverside with the distant and more hilly parts of the town, which constituted the residential quarter, and from which a large portion of the passenger traffic of the railway and the ferry was alike derived. The corporation ran their cars at intervals of ten minutes, and during the greater part of the day the cars passed the Central Station of the defendant company; but during certain portions of the day they took an alternative route which led directly to the ferry without passing the defendants' station, and the defendants were thereby placed at a great disadvantage in competing with the corporation for the traffic between Liverpool and Birkenhead. Accordingly, in the autumn of 1905, the defendants applied to the corporation, as the licensing authority, under the Birkenhead Corporation Act, 1881 (44 & 45 Vict. c. cliii.), and the Town Police Clauses Acts, 1847 and 1889 (10 & 11 Vict. c. 89 and 52 & 53 Vict. c. 14), to license six motor omnibuses to ply for hire as hackney carriages within the borough. The corporation granted the licences, but without prejudice to their right to take any further steps in the matter. In December, 1905, the defendant company instituted a service of motor omnibuses in connection with their train service, running every six minutes from 8 A.M. to 7.30 P.M. between their Central Station and the residential portion of the

town. These omnibuses picked up passengers along the road or at specific stopping places, and conveyed them to such other places on their route as the passengers might desire, and separate fares were fixed for journeys between intervening stopping places on the line of route. In all cases, however, the complete routes of these omnibuses either commenced or ended at the Central Station. The defendants had no express power under their special Acts to run omnibuses in connection with their trains.

Warrington J. held that it was ultra vires of the defendant company to carry on the business of omnibus proprietors, and granted the injunction.

The railway company appealed.

Upjohn, K.C., and *A. B. Shaw*, for the railway company. A railway company is impliedly authorized to do anything which is reasonably incidental to its main purpose: *Attorney-General* v. *Great Eastern Ry. Co.* (1); and that case also shews that the doctrine of ultra vires is to be applied reasonably. Therefore the real question here is whether the defendant company as incidental to its business has power to collect and deliver railway passengers as distinguished from goods. The special Acts of the company are silent in the matter, but no special powers are required. That a railway company may without any special powers collect and deliver goods has been assumed in several cases—*Hall & Co.* v. *London, Brighton and South Coast Ry. Co.* (2), *Sowerby* v. *Great Northern Ry. Co.* (3); *Baxendale* v. *London and South Western Ry. Co.* (4)—and it will not be disputed. By s. 86 of the Railways Clauses Act, 1845, passengers and goods are placed upon the same footing, and we submit that for the present purpose no material distinction can be drawn between them. In *South Wales Ry. Co.* v. *Redmond* (5) Willes J. spoke of the institution of an omnibus service to carry passengers to and from the station as being an ordinary incident of a railway company's business. Whether any particular thing is incidental to

(1) (1879) 11 Ch. D. 449; (1880) 5 App. Cas. 473.
(2) (1885) 15 Q. B. D. 505, 537.
(3) (1891) 7 Ry. & Ca. Tr. Cas. 156; 60 L. J. (Q.B.) 467.
(4) (1866) L. R. 1 Ex. 137.
(5) (1861) 9 W. R. 806.

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the undertaking of a company or not is a question of fact in each case. Thus it has been held that a railway company having authority to keep steamships for the purposes of a ferry might use them when not otherwise employed for pleasure trips: *Forrest* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1) Again, a railway company is not allowed to own and work collieries: *Attorney-General* v. *Great Northern Ry. Co.* (2); but if it cannot get coal otherwise, the keeping of a colliery becomes incidental to the undertaking of the company.

[BUCKLEY L.J. referred to *Simpson* v. *Westminster Palace Hotel Co.* (3), where it was held that an hotel company might let off some of the rooms of the hotel for a Government office.]

So it has been held that a trading company has an implied power to borrow money for the purposes of its business: *General Auction Estate and Monetary Co.* v. *Smith* (4); and that a manufacturing company may give gratuities to its servants: *Hampson* v. *Price's Patent Candle Co.* (5) On the other hand, a proposal by a railway company to subscribe to the Imperial Institute was held not incidental: *Tomkinson* v. *South Eastern Ry. Co.* (6) *Attorney-General* v. *London County Council* (7), on which Warrington J. based his judgment, is distinguishable from the present case, first, because the question turned to a great extent upon the special provisions of the London Tramways Act, 1896; and, secondly, because the omnibus business in that case was as a matter of fact an entirely different business from the tramway business, and could not be said to be in any sense incidental thereto. There is a wide distinction between a tramway company and a railway company for this purpose. Assuming, then, that an omnibus service for the passage of railway passengers or intending railway passengers is incidental to the undertaking of the railway company and is not ultra vires, does it become ultra vires because the company also carries other passengers? The defendants were bound to take out licences for their omnibuses,

(1) (1861) 30 Beav. 40.
(2) (1860) 1 Dr. & Sm. 154.
(3) (1860) 8 H. L. C. 712.
(4) [1891] 3 Ch. 432.
(5) (1876) 34 L. T. 711.
(6) (1887) 35 Ch. D. 675.
(7) [1901] 1 Ch. 781; [1902] A. C. 165.

and this case has been dealt with on the footing that under the Town Police Clauses Act, 1847, ss. 37, 38, 52, and the Town Police Clauses Act, 1889, ss. 2, 3, 4, and the Birkenhead Corporation Act, 1881, s. 126, they were bound to carry in their omnibuses any member of the public so long as there was room for him, and whether he was travelling to or from a station or not. We do not admit that the defendants are under that obligation, but, whatever be the true construction of those statutes, the fact that they carry other passengers does not make their omnibus service ultra vires. If they are entitled to run these omnibuses they are entitled to use them to the best advantage so long as the omnibuses are bona fide run in connection with the train service. The authorities establish that when a company has properly acquired property for its intra vires business, it may utilize that property for some object not within its main object with a view to making a profit outside its main object, provided that it is directly connected with the carrying on of its authorized business: see particularly *Attorney-General* v. *Great Eastern Ry. Co.* (1)

[VAUGHAN WILLIAMS L.J. The question is rather whether the defendants are not holding themselves out as carrying other passengers. They are charging separate fares between intermediate stopping places.]

The defendants are prepared not to have any fares except with a station as a terminus, and will give an undertaking to that effect.

[FLETCHER MOULTON L.J. referred to *Pegler* v. *Monmouthshire Ry. and Canal Co.* (2)]

Cripps, K.C., and *Leslie Scott*, for the corporation. We take the general law on the subject to be as stated by Cozens-Hardy J. in *Attorney-General* v. *London County Council* (3), and by Warrington J. at the commencement of his judgment in this case. (4) You must take the statute or the memorandum of association, as the case may be, and see what upon a reasonable construction is included in it, and then you must see what may be fairly regarded as incidental to that which is expressly

(1) 11 Ch. D. 449, 480-1.
(2) (1861) 30 L. J. (Ex.) 249.
(3) [1901] 1 Ch. 781, 788.
(4) [1906] 1 Ch. 811, 815.

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included. Anything which is reasonably proper for the working of the authorized business of the company is within its powers; but convenience to the public and profit to the company are not the tests of what is incidental: *Attorney-General* v. *London County Council* (1), per Cozens-Hardy J. Accordingly it has been held that subsidizing a steam packet company is not incidental to the powers of a railway company, although it might result in an increase of the profits of the railway: *Colman* v. *Eastern Counties Ry. Co.* (2) In this case providing an omnibus service is not reasonably proper for the working of the railway. The defendants are carrying on the business of general omnibus proprietors; they are bound by their licences to carry anybody for whom there is room, and their omnibuses pick up passengers, irrespective of whether the station is a terminus or not, in exactly the same way as any other omnibus. If necessary we say that the defendants are holding themselves out as carrying on an ordinary omnibus business, though the test is rather what the defendants are doing than what they are holding themselves out as doing. This case is really indistinguishable in principle from *Attorney-General* v. *London County Council.* (1) *Attorney-General* v. *Manchester Corporation* (3) is also in point. There the corporation in connection with their tramway business set up a general parcels delivery business, but it was held that, except as to parcels carried on the tramways, that business was ultra vires. For the purposes of the present case there is no substantial distinction between a tramway company and a railway company, but there is an essential distinction between delivering passengers and delivering goods, for railway companies are not common carriers of passengers though they are common carriers of goods, and the extent of their liability is different in the two cases: *Readhead* v. *Midland Ry. Co.* (4); notes to *Coggs* v. *Bernard.* (5) As regards goods, the duty is to carry and deliver, but as regards passengers the duty is only to carry. There is therefore no analogy between the carriage of goods and the carriage of passengers, and *Hall & Co.* v. *London, Brighton and South Coast*

(1) [1901] 1 Ch. 781, 790.
(2) (1846) 10 Beav. 1.
(3) [1906] 1 Ch. 643.
(4) (1869) L. R. 4 Q. B. 379.
(5) (1703) Smith's Leading Cases (11th ed.), vol. i. p. 207.

Ry. Co. (1) and the other cases dealing with the charges to be allowed to a railway company for the carriage of goods do not apply. As to the suggestion that fares between intermediate stopping places shall be abolished, the answer is that it is equally ultra vires to run omnibuses open to everybody whether they are going to or from the station only or not. It will not be possible to run the omnibuses in such a way as to limit the user by the public. If private omnibuses are ordered by railway passengers or intending railway passengers to carry their families and luggage to or from the station, that might not be ultra vires, but that is a different matter from running a public omnibus service.

Upjohn, K.C., in reply. There is no difference in principle between running public omnibuses and private omnibuses provided that the service of omnibuses is bona fide intended for the carriage of passengers and intending passengers by the railway. *Colman* v. *Eastern Counties Ry. Co.* (2) is distinguishable, because there the object of the company was to convey passengers along an additional route.

Cur. adv. vult.

Dec. 4. VAUGHAN WILLIAMS L.J. Lord Halsbury begins his judgment in *London County Council* v. *Attorney-General* (3) by saying: "It appears to me that, as far as any question of general law is involved in this case, the whole ambit of the considerations that arise has been completely traversed by the two cases of *Ashbury Railway Carriage and Iron Co.* v. *Riche* (4) and *Attorney-General* v. *Great Eastern Ry. Co.* (5), and I do not think that much would be gained by going through each individual topic of it, because I think now it cannot be doubted that those two cases do constitute the law upon this subject. It is impossible to go behind those two cases: they are now part of the law of this country, and we must acquiesce in them, whether we like them or not." I certainly do not like the application of this part of the law to the present case. No

(1) 15 Q. B. D. 505, 537.
(2) 10 Beav. 1.
(3) [1902] A. C. 165, 167.
(4) (1875) L. R. 7 H. L. 653.
(5) 5 App. Cas. 473.

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one will, in my opinion, be hurt by the running of these motor omnibus carriages for the convenience of those who have travelled or propose to travel as passengers by the railway which runs under the Mersey, nor is public convenience interfered with because these motor carriages carry passengers who are travelling for intermediate distances on their route to and from the railway station. It is difficult also to avoid the conclusion that the corporation of Birkenhead, who have set the Attorney-General in motion in this case, have been actuated rather by a desire to gain an advantage over a company which is competing with the municipal trading of the corporation than by any sense of public convenience or public welfare. Still, the law must be applied as it is constituted by prior decisions. *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1) certainly does decide that a corporation must shew something within the four corners of the Act of Parliament under which they are created to justify the assumption of the power which they claim to exercise, and the case of *London County Council* v. *Attorney-General* (2) decided, affirming the decision of the Court of Appeal (3), that the London County Tramways Act, 1896, which authorized the London County Council to purchase and work tramways, and to provide, place, and run carriages thereon, and to provide such horses, cars, fixed and movable plant, harness, and apparatus as might be useful and convenient for working the tramways, gave the county council no power to purchase or run omnibus carriages in the streets of London, such a business not being incidental to the working of the tramways.

Now, although in the House of Lords and in the Court of Appeal and in the judgment of Cozens-Hardy J. the decision is based partly on the ground that the power given to the county council by the London County Tramways Act, 1896, expressly excluded upon its true construction that which did exist as a separate business under the earlier statute, and was not conferred, and obviously was not intended to be conferred, upon the London County Council, yet another ground of all these decisions was that the London County Council were carrying on

(1) L. R. 7 H. L. 653. (2) [1902] A. C. 165.
(3) [1901] 1 Ch. 781.

two businesses, the business of a tramway company and the business of omnibus proprietors, and that for the one they had express power of Parliament and for the other no authority at all. Lord Macnaghten says (1): "It is quite true that the two businesses can be worked conveniently together; but the one is not incidental to the other. The business of an omnibus proprietor is no more incidental to the business of a tramway company than the business of steamship owners is incidental to the undertaking of a railway company which has its terminus at a sea port." In these last words Lord Macnaghten is obviously referring to the case of *Colman* v. *Eastern Counties Ry. Co.* (2), and when he speaks of the omnibus business not being incidental to the tramway business, he is referring to the words of Lord Selborne in *Attorney-General* v. *Great Eastern Ry. Co.* (3), where, although recognizing the principle laid down by Lord Blackburn in the same case (4), as the result of *Ashbury Railway Carriage and Iron Co.* v. *Riche* (5), that "Where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited," points out (6) that the doctrine of ultra vires "ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires."

Now there can be no doubt that the case of *Attorney-General* v. *Great Eastern Ry. Co.* (3) and the passages quoted were present to the mind of Lord Macnaghten and the other Law Lords and judges who took part in the decision in the *London County Council Case* (7), and yet they clearly held that the running of the omnibus traffic could not be regarded as consequential on or incidental to the exercise by the London County Council of their statutory powers as a tramway company. Can the Court

(1) [1902] A. C. 169.
(2) 10 Beav. 1.
(3) 5 App. Cas. 473.
(4) 5 App. Cas. 481.
(5) L. R. 7 H. L. 653.
(6) 5 App. Cas. 478.
(7) [1902] A. C. 165.

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in the light of these decisions regard the running by the Mersey Railway Company of these motor omnibus cars which carry no small number of passengers, of whom a considerable proportion were, and are, passengers not boarding or alighting at stations of the defendant company, as the doing of something consequential on or incidental to the business of a railway company or the exercise by the company of its statutory powers? I think not. The difficulty of so holding is enhanced by the fact that the fares payable by the passengers are in some cases fixed for journeys by passengers neither boarding nor alighting at stations of the railway company. The real position taken up by the defendant company is to say: True, the company do carry on the business of omnibus proprietors, taking up and setting down passengers exactly in the manner and under the conditions under which persons carrying on the business of omnibus proprietors conduct their business, but they carry on that business of omnibus proprietors bona fide for the purpose of giving the public facilities for reaching the railway station of the company or their destinations after travelling as passengers on the railway of the company, and they say further that the competition of the municipal ferry served by the municipal tramways converging at the landing and embarking stages of the ferry makes it essential to the continued conduct of the railway business that the defendant company should afford such facilities for the user by the public of their railway under the Mersey competing with the ferry over the Mersey, and that the defendant company would prefer, if it were possible, which it is not, so to do, to carry by their motor omnibus system exclusively those boarding or alighting at stations of the defendant company.

It is argued that in this state of circumstances we ought, having regard to the position of difficulty in which the railway company are placed, to hold the omnibus system consequential on or incidental to the business of the railway company, but I cannot persuade myself that an omnibus business so carried on is consequential on or incidental to the statutory powers of the defendant company in such sense as to bring the carrying on of the omnibus business within those powers. I think, however, that the Court ought, before confirming the order for the injunction,

to give the defendant company every facility for so modifying the mode of running their omnibus system as to bring it within their statutory powers. I think therefore we should postpone the confirmation of the order of Warrington J. so as to enable the defendant company to modify their system and the Court so to limit the terms of the injunction as to leave the company free to supply omnibus facilities for passengers going to or from their station.

Fletcher Moulton L.J., after stating the facts substantially as above set out, added that he found as a fact that this service of omnibuses was started and worked by the defendant company bona fide for the purpose of the passenger traffic on the railway, and not with any intention of including in the business of the company the business of an omnibus company as an independent speculation, but that in the manner in which it was now worked the service did not differ from such a business in any of its incidents other than that the times of running of the omnibuses and their routes had been so fixed as most effectively to further the purposes of the railway by promoting its passenger traffic, and he continued as follows:—

The real plaintiffs in this case are the corporation of Birkenhead, who, in the person of the Attorney-General, allege that the railway company, in instituting this service of motor omnibuses, are acting ultra vires and claim the intervention of the Court to prevent their continuing so to act. If they are right in their contention that the acts in question are ultra vires, there is no doubt that the action is well founded so far as regards the parties to it. Nor is there any doubt as to the law applicable to the case. It is authoritatively laid down by Lord Halsbury in the case of *London County Council* v. *Attorney-General* (1), by reference to the decisions of the House of Lords in the two cases of *Ashbury Railway Carriage and Iron Co.* v. *Riche* (2) and *Attorney-General* v. *Great Eastern Ry. Co.* (3) They establish that, in the case of a company created by statute for a special purpose, that which is not permitted by the statute is

(1) [1902] A. C. 165. (2) L. R. 7 H. L. 653.
(3) 5 App. Cas. 473.

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impliedly prohibited, but that, in applying this principle, whatever may be regarded as incidental to or consequential upon those things which the Legislature has authorized ought not, unless expressly prohibited, to be held by judicial construction to be ultra vires. The difficulties that arise in cases like the present, therefore, are not in defining the law, but in applying it to the facts of the particular case.

The first question I propose to consider is the general question whether a railway company may undertake the collection and delivery of passengers from or at their residences, or whether it is ultra vires on their part to have anything to do with the carriage of passengers beyond the actual limits of their own railway stations. Valuable assistance in deciding this point may be obtained by considering the case of the carriage of goods. From a date shortly after the first institution of railways it has been consistently recognized by the Courts that it is intra vires of those companies to collect and deliver goods in this way, and in the case of *Baxendale* v. *London and South Western Ry. Co.* (1), it was laid down that this collection and delivery were not acts done by the railway company in their capacity of common carriers, but were auxiliary and subsidiary to the business of the company as carriers by railway. Now railway companies are as unquestionably carriers of passengers by their railways as they are carriers of goods, and, although no doubt the services which they may reasonably perform in the two cases will differ in many respects both in nature and degree by reason of the difference in the subject-matter of these services, I can see no reason based either on law or on good sense why they should not perform the services of collecting and delivering passengers in the neighbourhood of their stations in the same way as they do goods. If the one service is auxiliary and subsidiary to their functions as carriers of goods by railway, the other seems to me to be equally auxiliary and subsidiary to their duties as carriers of passengers by railway. The reasonableness and the general convenience of their so doing is evident when one thinks of the case of parties consisting of many persons travelling with large amounts of luggage and starting from the same house, as upon

(1) L. R. 1 Ex. 137.

such occasions as holiday journeys. But I can see no reason for restricting the power to these extreme cases. If a railway company choose to pick up their passengers at or near their residences, or even in the public streets, and convey them to the station either gratis or for agreed charges I can see nothing that is ultra vires in their so doing.

If, then, these motor omnibuses did no more than collect and distribute passengers or intending passengers on the railway the case would in my opinion be free of difficulty. But in the present case the service of omnibuses performs all the functions of an ordinary omnibus service, and makes no distinction whatever between persons who have been or who intend to be passengers on the railway and members of the general public. It is urged, therefore, by the plaintiffs that this is a separate and independent business beyond the statutory powers of the railway company, and that its effect on the business of the company is only an incidental consequence of its existence, and that it therefore comes directly within the scope of the decision of the House of Lords in *London County Council* v. *Attorney-General.* (1)

The facts of the case give strong support to these contentions. It cannot be denied that it is worked in all essential respects as an ordinary omnibus service. The persons whom it picks up at its intermediate stations on its outward journey and those it puts down on its return journey are members of the public who presumably have no connection with the railway traffic, and, indeed, the presence of such persons on the return journeys may actually diminish the advantage of the omnibus service to the railway traffic by occupying places which might otherwise be occupied by intending travellers. These considerations would, in my opinion, be fatal to the plea put forward on behalf of the defendants were it not for a class of cases in which it has been held that where a statutory company has been authorized to purchase and work plant or to acquire property for or in connection with its statutory purposes, and accordingly has in fact purchased such plant and acquired such property bona fide for such purposes, it is not ultra vires of the company to use such plant or property for extraneous purposes when and so far as such

(1) [1902] A. C. 165.

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user does not diminish its availability for those recognized purposes. The most striking instance of this type of case is *Forrest* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1) It was there decided that the defendant company, which was authorized to purchase and use steamers for the purposes of a ferry between Barton-on-Humber and Hull, and had for that purpose acquired eight steamers, which were used as required for ferry purposes, might lawfully use them when not so required in taking passengers on excursion trips for reward, on the ground that it was not bound to keep the steamers idle at times when they were unemployed at the ferry, but might use them profitably for other purposes in order to diminish the cost of maintaining the ferry service. The case of *London and North Western Ry. Co.* v. *Price & Son* (2) illustrates the same principle, though the user itself was of much smaller importance. The railway company was there held entitled to use and charge for the use of its scales in weighing coal for customers, and even for the public at large, although such weighing had nothing whatever to do with the business of the company.

The Court has therefore to draw the line between a user which is in its nature indiscriminate and renders services to the public indifferently, whether such services bear directly on the legitimate objects of the company or not, and one which, while substantially operating to promote the legitimate objects of the company, yet incidentally and without prejudice to its usefulness for those objects may render services for reward to the public, and thus diminish its costliness to the railway company. So long as we are careful to follow the guidance of the principles which have been so definitely laid down by the House of Lords, and which are not in my opinion inconsistent with the cases to which I have last referred, this becomes a question of fact rather than of law, and the Court has to decide whether the particular acts which are before it come under the category to which the acts of the defendants belonged in the case of *London County Council* v. *Attorney-General* (3), or to that in the case of *Forrest* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1)

(1) 30 Beav. 40. (2) (1883) 11 Q. B. D. 485.
(3) [1902] A. C. 165.

In the former case the critical facts (apart from the question of construction of the provisions of the special Act, which was not without its influence on certain members of the Court of Appeal as well as of the House of Lords) were that the service of omnibuses which had been instituted by the London County Council was admittedly under statutory obligations to treat all members of the public alike, independently of whether they were or were not passengers or intending passengers on the tramway, and that the routes and nature of the service distinguished it in no way from any other service of omnibuses in the public streets or made it specially auxiliary to the tramways, excepting that the ultimate termini of all the routes were at the tramway stations. As the present case was presented to the Court below the defendants did not in my opinion establish any substantial distinction in their own favour in these matters between this case and that of *Attorney-General* v. *London County Council* (1), because they admitted they were under like obligations to the public and even sought to rely upon this as a defence for their conduct. They only urged that they were a railway company and not a tramway, and further that their service of omnibuses passed to and from a district which was a specially rich source of passenger traffic to them to a greater degree than the streets of London through which the omnibus traffic of the London County Council passed could be said to be a specially rich source of tramway traffic, and that these matters constituted distinctions which put the present case beyond the scope of the decision in the *London County Council Case*. (1) I agree that neither of these distinctions is wholly devoid of weight. But if they stood alone, and if I accepted the defendants' view that they are bound to conduct their omnibus service in the same way as regards the general public as was the case with the London County Council service of omnibuses, I should not have seen my way to distinguish the present case from the earlier one so far as the question of ultra vires is concerned. But I am not convinced that this view of their position is correct. The obligation of the London County Council to take all passengers that might present themselves is based on statutory provisions utterly different in

(1) [1902] A. C. 165.

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language, and in my opinion in meaning, from those under which the omnibuses in the present case come, and I am of opinion that it is within the power of the railway company to decline to take persons other than passengers or intending passengers on their railway, and that if they do so their action will be intra vires. And if they cease to hold themselves out as carriers of passengers in their omnibuses otherwise than to and from the railway station, their action will not be rendered ultra vires because the public, in individual cases, take advantage of the impracticability of enforcing this restriction rigorously so that occasionally passengers are carried who have no right to use these facilities. But this will necessitate all fares being fixed as fares either from or to some railway station, so that the company will no longer pick up passengers at lower fares between intermediate stopping places, and the service will be run as a service for collecting and distributing passengers and nothing else so far as is practicable or as can reasonably be expected from the company.

As I have referred to the contrast between the legislative provisions which obtained in the *London County Council Case* (1) and those that obtain in the present case as being material for our consideration I will examine them more in detail. Omnibuses in London are under the provision of the London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86), and by s. 33 it is provided that "every driver or conductor of any metropolitan street carriage . . . . who shall refuse to admit and carry at the lawful fare any passenger for whom there is room, and to whose admission no reasonable objection is made . . . . shall for every such offence forfeit the sum of 20*s*." This provision amply justifies the statement in the judgment of the judge of first instance in the *London County Council Case* (1) that the omnibuses were compelled by law to carry members of the public indifferently. This Act, however, applies only to the metropolis, and the provisions of the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), the corresponding Act for the rest of the kingdom, are very different. The section of the Act which is supposed to compel the drivers of omnibuses in Birkenhead to take any passenger presenting himself is s. 52. The earlier portion of this section

(1) [1902] A. C. 165.

forbids hackney carriages to ply for hire unless the number of persons to be carried thereby is exhibited upon them, and the later portion is in the following words: "If the driver of any such hackney carriage refuse, when required by the hirer thereof, to carry in or by such hackney carriage the number of persons painted thereon, or any less number, every proprietor or driver so offending shall be liable to a penalty not exceeding 40*s*." The sections of that Act were originally enacted with regard to hackney carriages only, but in the special Act relating to Birkenhead the operation of this section (in company with certain other sections not material to this case) was extended by the provision that the terms "hackney carriage or carriages" should "be deemed to include every omnibus, waggonette, or other carriage plying or standing for hire by or used to carry passengers at separate fares to, from, or in any part of the borough."

Now it is clear that as originally passed this section refers to cases in which a person having hired a hackney carriage is desirous of using it to its full extent. For instance, if he has hired a four-wheeled cab, the section provides that the driver cannot object to allowing four persons to enter and use the cab. It was obviously intended to deal with such cases and such cases only, and this must of course still remain its significance as applied to hackney carriages. But it is suggested that because the term hackney carriage has now been extended to include omnibuses it must with respect to omnibuses mean that the conductor is bound to take up any person wishing to ride if there is room. To accept this would be to give to the language of the section totally different interpretations in the two cases. The words are perfectly apposite to express the undoubted meaning of the section in the first case. The contract is a contract of hiring, and it is made with the driver. If made it clearly gives to the hirer the legal right to the use of the whole carriage, and it is to ensure that he should enjoy to the full the right so acquired by him that the statute has prescribed a penalty on the driver who refuses to allow him to do so. But the words are utterly inappropriate to express the meaning suggested in the second case. The contract is usually made with the conductor and not with the driver. It is not a contract of hiring of the

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vehicle or one which, if made, would by law entitle the passenger to the use of the vehicle to its full extent or anything more than the possession of one seat therein. The suggested meaning would give to each passenger the right to compel the driver to carry persons in whom he has no interest and on behalf of whom he has made no contract. To sum up, words which in their original significance (which is still their signification in the case of hackney carriages) relate solely to the faithful carrying out of a contract when made are, by reason of an extension of the definition, to be taken to prescribe the compulsory making of a contract of a wholly different character. I can see no justification for such an interpretation. It is urged that this part of the section must in some way or other be interpreted so as to make it apply to the new subject-matter. I see no such necessity, and it certainly does not justify our putting upon the words of the section two inconsistent interpretations. In my opinion, in spite of the broadening of the definition, this portion of the section does not apply to omnibuses, for the plain reason that by the nature of its provisions it is inapplicable thereto. This is not the case with the earlier part of the section, which is clearly applicable to omnibuses and hackney carriages, and amply accounts for the inclusion of this section amongst those to which the enlarged definition is to apply. I am of opinion, therefore, that the defendant company are not statutably compelled to carry persons in their omnibuses other than passengers or intending passengers on their railway, and that, if they undertake to modify their working of the omnibuses in the way that I have indicated, their action will be intra vires, because the doctrine of ultra vires is to be applied reasonably.

On these terms, and with these limitations, I am of opinion that the appeal should be allowed. But as at present carried on, I cannot distinguish between that which they are doing and their establishing lines of omnibuses to do the whole of the omnibus traffic along certain routes in the town of Birkenhead. Their service is more frequent, and probably more rapid, than the competing traffic of the tramways, and if they are allowed to carry on this traffic without any restriction, it is tantamount to deciding that they may undertake omnibus

traffic wherever they think that one of the consequences of its being established will be that passengers are attracted to their railway. This appears to me to be in direct conflict with the principles laid down by the House of Lords in the cases to which I have referred, and more especially with the example which they have given us of the application of those principles in their decision in the case of the *London County Council* v. *Attorney-General*. (1)

Buckley L.J. We have here to deal with a statutory corporation. The general rule is that a chartered company can do anything which is not by its charter forbidden, but that a statutory corporation can do only that which is by its statute authorized. The chartered corporation is a corporation at common law. The statutory corporation is not. The latter owes its existence wholly to the statute and cannot go beyond the statute which creates it. The statute, however, in many cases defines only the purpose; sometimes it also defines special powers. But, whether in the one case or the other, the statutory corporation is not by the general principle above stated restricted to acts specifically mentioned or referred to in the statute. To ascertain whether any particular act is ultra vires of the statutory corporation or not the main purpose must first be ascertained; then the special powers for effectuating that purpose must be looked for, and then, if the act is not within either the main purpose as described in or the special powers expressly given by the statute, the inquiry remains whether the act is incidental to or consequential upon the main purpose and is a thing reasonably to be done for effectuating it. To quote Lord Selborne in *Attorney-General* v. *Great Eastern Ry. Co.* (2), the doctrine of ultra vires is to be reasonably and not unreasonably understood and applied, and whatever may fairly be regarded as incidental to or consequential upon those things which the Legislature has authorized ought not (unless expressly prohibited) to be held by judicial construction to be ultra vires. By way of illustration, let me suppose that the main purpose found in the statute or in the memorandum of association of a statutory company is to

(1) [1902] A. C. 165. (2) 5 App. Cas. 478.

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establish and carry on an hotel, and that express power is given to buy land at a particular place and to build, and that as to anything further the statute or memorandum of association is silent. It is quite clear law that all such acts as are reasonably necessary for effectuating that purpose are intra vires, such, for instance, as the purchase of furniture, and of linen, of provisions, and of wines and spirits, the hiring of servants, the payment of licences, the ownership probably of horses and carriages, the maintenance and working of an omnibus which shall attend at the railway station to take intending guests to the hotel and the like. In a large number of cases the maintenance of a garden and pleasure grounds would be intra vires. The legitimate extent of these would depend upon circumstances. The maintenance of tennis lawns or of a bowling green would, in many circumstances, be legitimate. Under circumstances such as presently put a golf links might be intra vires. All these and the like will without express mention be within the company's powers. Then I may instance other acts as to which it would be a question of fact in the case of the particular hotel whether it was such an act as was reasonably incidental or consequential. If, for instance, the hotel were at Bundoran or Rosapenna or elsewhere in the county Donegal it might be intra vires to lay out and maintain in good order a golf links or to acquire rights of fishing and to own boats and supply gillies for the purpose of fishing upon the lakes. It may be that in the particular locality custom could only be reasonably expected or obtained by offering those attractions, and they might be as necessary as a smoking-room or a bowling green elsewhere. I the hotel in question were the Savoy Hotel in the Strand or the Great Central Hotel in the Marylebone Road the proposition would cease to be true. So, again, if the hotel were situate in a place inaccessible unless special means of communication were provided—say, at a lovely spot at the end of a Scotch loch to which there is no road, or at a place to which there is access by road but which is not served by any coach or mail cart service—it might be intra vires for that hotel to run a steam launch or a motor car to bring its guests to their destination. It would in such a case be analogous to the omnibus which the hotel in the

country town sends to the railway station. The question is in each case a question of fact, Is the particular act as to which it is in question whether it is intra vires an act which in the circumstances of that particular case is incidental to or consequential upon or reasonably necessary for effectuating the main purpose which the statute defines?

The learned judge below has dealt with this case as if the decision of this Court and of the House of Lords in the *Attorney-General* v. *London County Council*(1) concluded it. In that case, as it appears to me, two matters came in question, and upon the decision of these the case turned. They were, first, the true construction of s. 2 of the London County Tramways Act, 1896 (59 & 60 Vict. c. li.), and, secondly, whether the omnibus business there carried on was a separate business or was one incidental or ancillary to the tramway business. Upon the former of these it was held that the London County Council could only purchase tramway undertakings as contrasted with omnibus undertakings. The vendor to the London County Council owned both a tramway undertaking and an omnibus undertaking. The goodwill of the omnibus undertaking was excluded from the sale. The first point was that, as matter of construction of the Act, the London County Council was excluded from the omnibus business. "The power" (said Lord Halsbury) (2) "which is expressly given to the London County Council excludes from them, and to my mind is intended to exclude from them, that which did exist as a separate business under the earlier statute, and which was not intended, and obviously was not intended, to be conferred upon the London County Council." Rigby L.J. in this Court had said (3): "If the intention was, and if Parliament was disposed to accede to it, that the county council should take over and work the whole of the company's undertaking, including both branches, namely, the tramway branch and the omnibus branch, it would have been easy to say so in s. 2 of the London County Tramways Act, 1896. Nothing of the sort is said, and it is admitted that there is nothing in the section which clearly and specifically refers to a transfer of the whole undertaking and power to run

(1) [1901] 1 Ch. 781; [1902] A. C. 165. (2) [1902] A. C. 167.
(3) [1901] 1 Ch. 799.

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both tramways and omnibuses." Vaughan Williams L.J. pointed to the same consideration (1), and in the Court below Cozens-Hardy J. had emphasized the same point. (2) The second question was a question of fact, namely, whether the omnibus business was a separate business. It was held that it was. If this be the true effect of that case, it, of course, does not relieve me from investigating whether upon the state of facts in this case the business is really a separate business or is only one incidental to the main business. From the fact that it was a separate business there it does not follow that it is a separate business here.

Let me first see as a general question whether the ownership and running of omnibuses for the convenience of passengers can be said to be without qualification ultra vires of this railway company. The order below has affirmed that it is. The order declares that it is beyond the powers of the defendant company to run or work omnibuses for the purpose of carrying passengers in any of the streets within the borough of Birkenhead. This would preclude the defendant company from supplying for the use of passengers a private omnibus hired by the passenger to take him from or to the station. Nobody has advanced that as a proposition which can be supported. In my opinion it is impossible to support it. A reasonable service to be rendered to the passenger to enable him to make his journey complete is no more as a general proposition ultra vires than is the service of a porter to wheel his luggage to a cab or according to circumstances, say, at Crianlarich, on the West Highland Railway, to the neighbouring station of another railway. The order below is, at any rate, too wide.

Then, secondly, if railway companies may own and run omnibuses for some purposes, may they bona fide run omnibuses which are not let to a single particular hirer, but which stand at the station to take up passengers at separate fares and convey them by a definite route at any point of which the passenger may alight? I cannot see how this in principle differs from the first case. There is no magic in a single hirer as distinguished from several passengers at separate fares. The omnibus in that case

(1) [1901] 1 Ch. 804. (2) [1901] 1 Ch. 789.

would, I think, be a facility offered to passengers, and the act would be one reasonably to be done for effectuating the purpose of developing the traffic of the railway.

Thirdly, suppose the omnibus is travelling to the station as an omnibus available to take passengers at separate fares. In such case, there is an obvious difficulty in knowing whether the passenger who hails the omnibus is going to the station or not. If the omnibus be really run as an omnibus to the station, it does not, I think, lose that character by reason of the fact that persons may claim to be passengers in the omnibus who turn out afterwards not to be passengers on the railway.

Lastly, suppose that the omnibus which starts from the station takes up passengers in the streets on its journey, does this make the running of the omnibus ultra vires? This is, I think, a question of degree. If I arrive at the conclusion that as a matter of fact the service of the omnibus is bona fide supplied for the use of persons who have been or who are going to be passengers on the railway, its employment does not become ultra vires because in use as a commercial matter passengers are not refused whose conveyance will add something to the profits or diminish something of the loss upon the working of the omnibuses.

A good deal of discussion has taken place as to whether the company can obtain the licence of the corporation to run omnibuses except upon the terms that they shall be bound to take any person on their route who wishes to be a passenger and pays his fare. I think it unnecessary to form any concluded opinion as to whether this is an obligation or not. If it be an obligation so that they cannot run omnibuses bona fide for the purposes of their railway without performing it, then I think it cannot render the act ultra vires if they submit to that necessity when, as I find to be the fact, this will be only an adventitious and not a principal service. If, on the other hand, they are not bound to come under the obligation, I think, as above stated, that, if the omnibus is really for the purposes of the railway, the act does not become ultra vires by their taking to a reasonable extent extraneous traffic which adds something to the commercial prosperity of the undertaking. Upon the authorities a corporation may reasonably use its property in such a manner for

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purposes not forming part of its main purpose. I may mention by way of illustration, taking them in order of date, *Simpson* v. *Westminster Palace Hotel Co.* (1), where a portion of the hotel in the course of being built was let off for a time for a Government department; *Forrest* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (2), where steam vessels, kept for the purposes of a ferry, were employed, when not wanted for that purpose, for excursion trips on the sea; *London and North Western Ry. Co.* v. *Price & Son* (3), where the railway company allowed its weighing machine to be used for hire for weighing someone else's coals; and *Foster* v. *London, Chatham and Dover Ry. Co.* (4), where a railway company let its arches for shops.

In my judgment, therefore, the decision of the present case must be simply a decision of this question of fact, Are the defendants really running the omnibuses here in question for the purpose of their railway and so as to obtain and give facilities for better traffic over their line, or is the omnibus business really an independent business in which they look substantially to general street traffic? Upon this question of fact the decision of *London County Council* v. *Attorney-General* (5) is not conclusive nor even necessarily applicable. My great difficulty in the matter arises from the fact that the evidence is so exceedingly meagre. The material facts, so far as I know them, are these: That the railway company is one whose undertaking is substantially a short line running under the Mersey between Birkenhead and Liverpool, that its service of trains is a service at six-minute intervals, that the omnibuses in question are also run at six-minute intervals so as to connect with the trains, that they run exclusively from and to the central station, that on the omnibuses appears prominently the statement that the omnibus runs to and from the Mersey railway station, that the service ceases in the evening about 7.30 or 8 o'clock, when the Birkenhead residents, for whom the service is specially intended, have mostly returned to their homes—a fact which seems to indicate that the defendants do not lay

(1) 8 H. L. C. 712.
(2) 30 Beav. 40.
(3) 11 Q. B. D. 485.
(4) [1895] 1 Q. B. 711.
(5) [1902] A. C. 165.

themselves out for general street traffic, such as traffic to the theatres or the like. To the above facts I add that the interest of the defendants is to prefer such persons as have been or are going to be passengers on their line, and, so far as they have any power of selection, their interest must be to take such members of the public as are, rather than those that are not, going to travel on the railway. To the above I add this fact, that the plaintiffs and relators in the action, the corporation of Birkenhead, are the owners of a rival means of crossing the Mersey, viz., a ferry, and are the owners of a system of tramways which are convenient for that ferry and not convenient for the defendants' railway. In the circumstances it was in my judgment a reasonable course that the defendants should seek to obtain their proper share of the traffic by giving facilities for reaching their railway, having regard to the facilities which the corporation enjoyed for attracting the traffic to the corporation's ferry. On the other side I have the fact that there are fares charged in two cases between points neither one of which is the central station. Upon these facts I arrive at the conclusion of fact that the defendants did really bona fide establish this system of omnibuses for the purpose of obtaining traffic on their railway; that the omnibuses are, so far as the defendants can ensure it, intended to be incidental to their railway and are reasonably wanted to effectuate the purpose of bringing to their railway the traffic or a fair proportion of the traffic. Thus answered the question is resolved in favour of the defendants.

The defendants are prepared to abandon the separate fares for persons travelling between points neither of which is the central station, which I will call outlying fares, and to give an undertaking that they will in future make all fares charged upon their omnibuses fares to or from some one of their stations, to the exclusion of fares to and from places neither one of which is such a station. This undertaking removes one matter which rather pressed upon the Court, viz., that the railway company might by these outlying fares be holding themselves out as seeking general street traffic, and another matter, viz., that if passengers at these outlying fares became proportionately numerous, a business which I think at present intra vires might develop into one which would

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be ultra vires. Upon this undertaking being given, I think the injunction granted below should be discharged.

VAUGHAN WILLIAMS L.J. I want to say this in respect of the judgment which I have delivered. There were a few words which I should like to add, and I have asked Buckley L.J. whether he sees any objection, because in a sense they refer to a matter referred to in his judgment, and he says he has no objection to my adding these words to my judgment to put it right. That is this: You ought to give a wider construction to the words of a memorandum of association creating and defining the powers of a purely commercial company having no compulsory powers and no monopoly than you would give to the words of a statute creating a company, like the railway company, having compulsory powers of land purchase and a practical monopoly.

Dec. 14. After some discussion the COURT made the following order (Buckley L.J. dissenting as to the costs):—

The defendants undertaking (1.) to run their omnibuses to or from a railway station upon their line and in connection with trains upon their railway, and not otherwise, and to so advertise their omnibus service, and not to advertise or hold themselves out as carrying on a general omnibus business or as carriers of passengers in their omnibuses otherwise than to or from one of their railway stations; (2.) to make all fares charged in respect of their omnibus service fares to or from some one of their stations, and not to make or charge any separate fare between places neither of which is such a station; (3.) to run their omnibus service as a service for railway passengers, and as far as reasonably practicable to confine their service to passengers to or from some or one of their stations, discharge the injunction, but without disturbing the order of the Court below as to costs. No order as to the costs of the appeal.

Solicitors: *Linklater, Addison, Brown & Jones; F. Venn & Co., for Alfred Gill, Birkenhead.*

H. B. H

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[1904 M. 1165.]

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Copyright—Book—Posthumous Letter—Proprietorship of Copyright—Author's Manuscript—Assignment—Right to prevent Publication—Copyright Act, 1842 (5 & 6 *Vict. c.* 45), *s.* 3.

Although at common law the writer of a letter and his legal personal representatives are entitled to prevent its publication, and this is a right of property, the copyright in a letter published after the death of the writer is vested by the Copyright Act, 1842, in the proprietor of the letter itself—i.e., of the paper and the writing upon it.

The proprietors of unpublished manuscripts, written by an author long deceased, assigned to S. E. & Co., in 1895, "all copyright which we possess and the exclusive right of publishing the entire collection of letters," S. E. & Co. "undertaking to return to us all the MSS. when copied." S. E. & Co. copied the letters, published them in 1898, and returned the originals to the assignors. The defendant subsequently purchased the originals from the assignors, with any rights which they might still have therein. He also took from the legal personal representative of the deceased author an assignment of the copyright and all other rights of the author in the letters. S. E. & Co. were now registered as owners of the copyright:—

Held, that by the assignment S. E. & Co. had become proprietors of the author's manuscript so as to enable them by first publication to obtain the copyright in the letters, and that they were entitled to an injunction restraining the defendant from publishing the letters.

Decision of Kekewich J., [1906] 1 Ch. 101, affirmed.

Appeal from a decision of Kekewich J. (1)

The plaintiffs in the action were two firms of publishers, Macmillan & Co. and Smith, Elder & Co. The defendant was also a publisher trading as J. M. Dent & Co.; and the question raised in the action was as to the proprietorship of the copyright in certain letters written by Charles Lamb to his friend Robert Lloyd between the years 1798 and 1810. Lamb died in 1834. In 1895 the letters, sixteen in number, were in the possession of Mr. and Mrs. F. H. Steeds, both of whom were descendants of Robert Lloyd, and they had not then been published. On

(1) [1906] 1 Ch. 101.

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March 5, 1895, Mr. and Mrs. Steeds entered into an agreement with Smith, Elder & Co. in the following terms:—

"Agreement dated the 5th day of March, 1895. We, Frederick Herbert Steeds and Mary Sophia his wife, of Lloyds Bank, Five Ways, Birmingham, in consideration of the sum of two hundred and fifty pounds (250*l.*) paid to us by Messrs. Smith, Elder & Co., of 15, Waterloo Place, London, S.W., hereby assign to them all copyright which we possess and the exclusive right of publishing the entire collection of letters and MSS. of the Lloyd family now transferred to them, including the letters and manuscripts of Charles Lamb, T. Manning and the Wordsworths; and we are ready to render them every assistance in our power in preparing such letters for publication, by sending them portraits and other family possessions, and by procuring, so far as we can, the concurrence of the Lloyd family in publication; Messrs. Smith, Elder & Co. undertaking to return to us all the MSS. when copied, and to present us with twelve copies of any book which they may publish on the subject."

The letters were copied and the originals returned to Mr. and Mrs. Steeds by Smith, Elder & Co. in due course. In 1898 Smith, Elder & Co. published a book entitled "Charles Lamb and the Lloyds," which contained these letters. In May, 1899 Smith, Elder & Co., in consideration of twenty-five guineas, granted to Macmillan & Co. permission to publish these letters in an edition of Lamb's letters to be edited by the late Canon Ainger, and undertook not to give a similar permission to any other firm. At the end of 1899 Macmillan & Co. published Canon Ainger's edition of Lamb's letters, and this edition contained the letters in question.

In November, 1902, the defendant, being desirous of bringing out an edition of Lamb's letters, applied to Smith, Elder & Co. for permission to include the letters in question in the action in his edition, but permission was refused. In May, 1903, the defendant purchased from Mr. Steeds these letters, together with certain other letters, for 250*l.* Mr. Steeds had previously informed the defendant of the assignment of the copyright in the letters to Smith, Elder & Co., and the receipt which he gave to the defendant for the 250*l.* was expressed to be for the letters and

also for any rights which he might still have therein. Towards the close of 1903 the defendant brought out his edition of Lamb's letters, including the letters in question, which he copied from the original manuscripts in his possession.

On January 20, 1904, Smith, Elder & Co. registered themselves as the proprietors of the copyright in the letters, and on April 30, 1904, the writ in this action was issued. The plaintiffs claimed—(1.) an injunction to restrain the defendant from publishing, selling or offering for sale any book which infringed the plaintiffs' rights in the letters in question; (2.) an account of profits; and (3.) delivery up of any letterpress in the possession of the defendant containing the said letters.

By his defence the defendant denied that Smith, Elder & Co. were the owners of the copyright in the letters; he alleged that there was no existing copyright in the letters, and contended that, if there were, it belonged to the legal personal representative of Charles Lamb.

On February 7, 1905, after action brought, the defendant took for 10*l.* an assignment from the administrator cum testamento annexo de bonis non of the estate of Charles Lamb of the copyright in the letters, and all other rights, express or implied, of Charles Lamb, as the author, writer or sender of the letters, and of his executors and administrators therein, with power to use the vendors' name in any proceedings for the protection of those rights.

Kekewich J. granted the injunction and an account of profits.

The defendant appealed.

Danckwerts, K.C., and *Sebastian*, for the appellant. At the time these letters were written, and down to 1842, the statute governing copyright was 8 Anne, c. 19, as extended by 41 Geo. 3, c. 107, and 54 Geo. 3, c. 156, and under 8 Anne, c. 19, s. 1, the author had a statutory copyright in works already composed and not printed, so that by this Act authors had a copyright in works composed and printed and also in works composed and not printed: *White* v. *Geroch.* (1) Lamb therefore at the time of his death, and his representatives afterwards down to 1842, had

(1) (1819) 2 B. & Al. 298.

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the statutory copyright in these letters, and the Copyright Act of 1842, s. 1, has carefully saved all rights existing at the time of its coming into force; the appellant has acquired from Lamb's representative all his existing rights, both statutory and proprietary. Lamb, by writing these letters to the Lloyds, did not part with his proprietary rights; the writer of a letter has a proprietary interest in it, inasmuch as he can prevent its publication, and in that sense he is the proprietor of the manuscript, and after his death this interest devolves on his legal personal representatives; and that there is jurisdiction to enforce this proprietary right and to restrain publication is clear: *Pope* v. *Curl* (1); *Duke of Queensberry* v. *Shebbeare* (2); *Thompson* v. *Stanhope* (3); *Earl of Granard* v. *Dunkin* (4); *Lord Perceval* v. *Phipps* (5); *Gee* v. *Pritchard* (6); *Oliver* v. *Oliver* (7); *Howard* v. *Gunn* (8); *Hopkinson* v. *Lord Burghley* (9); *Earl of Lytton* v. *Devey*. (10) The author's proprietary right continues notwithstanding some kind of communication to others, and entitles him to prevent publication by others until with his consent the composition has been communicated to the public: *Caird* v. *Sime*. (11) When once communicated to the public, then this proprietary right ceases, but not before: *Jefferys* v. *Boosey*. (12) The question, therefore, is, Has or has not the author in a particular case abandoned his proprietary right to the public? It is not every communication that amounts to an abandonment of this right: *Labouchere* v. *Hess* (13); *Walter* v. *Lane*. (14) In this last case the difference between the proprietary right of every man in his own composition and copyright, i.e., the exclusive privilege of making copies, conferred by statute, is emphasized. [*Millar* v. *Taylor* (15), *Donaldson* v. *Beckett* (16), and *Osborne* v. *Donaldson* (17) were also cited on this part of the argument.]

(1) (1741) 2 Atk. 342.
(2) (1758) 2 Eden, 329.
(3) (1774) Amb. 737.
(4) (1809) 1 Ball & B. 207.
(5) (1813) 2 V. & B. 19, 24.
(6) (1818) 2 Swans. 402.
(7) (1861) 11 C. B. (N.S.) 139.
(8) (1863) 32 Beav. 462.
(9) (1867) L. R. 2 Ch. 447.
(10) (1884) 54 L. J. (Ch.) 293.
(11) (1887) 12 App. Cas. 326, 337, 343.
(12) (1854) 4 H. L. C. 815.
(13) (1897) 77 L. T. 559.
(14) [1899] 2 Ch. 749; [1900] A. C. 539.
(15) (1769) 4 Burr. 2303, 2378.
(16) (1774) 2 Bro. P. C. 129.
(17) (1765) 2 Eden, 327.

Statutory copyright under the Act of 1842 has no existence till after publication, and, having regard to the decisions on the author's proprietary right, we contend that the words in s. 3 of the Copyright Act, 1842, "proprietor of the author's manuscript," must mean the proprietor of the literary composition which is written on the paper, in the sense of proprietor having the right to publish or prevent publication. During the lifetime of the author the copyright is in the author and his assigns, and it is not to be supposed that the Copyright Act of 1842 was intended to take away from authors any benefits which they possessed before: *Aflalo* v. *Lawrence & Bullen, Ld.* (1); one of the objects of the Act being to protect the author's literary compositions after his death.

The copyright of these letters, therefore, is vested in the defendant as the assign from Lamb's legal personal representative, and Mr. and Mrs. Steeds had no right of publication at all, and by the assignment of March 5, 1895, no copyright was assigned. The words are, "all copyright which we possess." At that date Mr. and Mrs. Steeds had no copyright at all and no right of publication. The plaintiffs published these letters without the consent of Lamb's personal representative, and their claim to copyright is based upon that wrongful act. The receiver of a letter has no right to publish it immediately after the author's death and so acquire a copyright possibly as against the author's own family; that is not a reasonable construction to place upon this section. The only way of reconciling the statute with the author's common law proprietary rights is to hold that the "proprietor of the author's manuscript" is the proprietor, not of the paper, but of the literary composition. There might be two manuscripts of the same composition in different hands, and it cannot have been intended that copyright should depend upon which of the two holders published first.

Scrutton, K.C., and *R. A. Wright*, for the respondents. The whole question of the proprietorship of the copyright in these letters turns upon the construction of s. 3 of the Copyright Act, 1842.(2) "Copyright" is defined by s. 2 to mean the sole liberty

(1) [1903] 1 Ch. 318, 337.

(2) Sect. 3 of the Copyright Act, 1842, enacts as follows: "The copyright in every book which shall after

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of printing or otherwise multiplying copies of any subject; and that copyright is conferred by s. 3 on the "author and his assigns" and "the proprietor of the author's manuscript from which such book shall be first published and his assigns." The word "assigns" in the latter part of the section means the assigns of the right which the proprietor of the manuscript had after the author's death to acquire the copyright by first publication. Authors and first publishers are by no means synonymous expressions. The owner of an unpublished manuscript, although not the author of it, acquires copyright in it by being the first to publish it: *Walter* v. *Lane*. (1) "Author's manuscript" means the actual paper on which the composition is written—duly authorized by the author, not surreptitiously copied.

Under the Copyright Acts before 1842 there was no copyright in unpublished compositions. *White* v. *Geroch* (2) is not an authority for the appellant's argument on this point. Copyright by common law was only a right to restrain publication, and it was put an end to by s. 3 of the Act of 1842: *Jefferys* v. *Boosey*. (3) At all events nothing more than a personal right to damages is left. Smith, Elder & Co. are assignees of the proprietors' rights and are entitled to sue for infringement of copyright: *Tuck* v. *Canton*. (4) These letters were in the possession of the Steeds as lawful owners. They were therefore the proprietors of the author's manuscript of the letters, and on the true construction of the assignment of March 5, 1895, they assigned the inchoate right of copyright to Smith, Elder & Co. Sect. 2 in the definition of

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the passing of this Act be published in the lifetime of its author shall endure for the natural life of such author, and for the further term of seven years, commencing at the time of his death, and shall be the property of such author and his assigns: Provided always, that if the said term of seven years shall expire before the end of forty-two years from the first publication of such book, the copyright shall in that case endure for such period of forty-two years; and the copyright in every book which shall be published after the death of its author shall endure for the term of forty-two years from the first publication thereof, and shall be the property of the proprietor of the author's manuscript from which such book shall be first published, and his assigns."

(1) [1899] 2 Ch. 749, 770; [1900] A. C. 539, 547.

(2) 2 B. & Al. 298.

(3) 4 H. L. C. 815.

(4) (1882) 51 L. J. (Q.B.) 363.

"assigns" in terms assumes that before publication of a book an author can assign the copyright which he will get after publication, and therefore the words "all copyright which we possess" covered the interest which arose after publication. Under the Act of 1842 the plaintiffs have a good title to the copyright in these letters.

Sebastian, in reply.

VAUGHAN WILLIAMS L.J. I think that the decision of Kekewich J. should be affirmed. Before dealing with the reasons which have led me to this conclusion, I want to say a word or two about the objection that Macmillan & Co., who are mere licensees, have no cause of action vested in them. I do not think it necessary for me to decide that question for the purpose of dealing with this appeal. If they have not a cause of action, Smith, Elder & Co., who are also plaintiffs, have a cause of action; and it is quite sufficient to support a judgment against the defendant if there is one plaintiff in whom the cause of action sued on properly rests. It is suggested that Mr. Dent may have been put to extra expense by reason of the persons who were responsible for the conduct of the action, ex abundanti cautela, having included two plaintiffs. It is enough to say that, if so, he ought to have the costs of any such addition of an unnecessary plaintiff.

Now, dealing with the merits of the appeal in this case, the first question is the construction of the 3rd section of the Copyright Act, 1842. This section deals first with the endurance of copyright in books thereafter to be published in the lifetime of the author, and says the copyright shall endure for the lifetime of the author and a further term of seven years commencing from the time of his death, and shall be the property of the author and his assigns. Then there is a proviso that if the term of seven years expires before the end of forty-two years from the first publication the copyright shall endure for the term of forty-two years. So much for the publication of books in the lifetime of the author and the vesting and endurance of the copyright. I am dealing with copyright here as meaning the multiplication of copies after publication. Then the section goes on to deal with the endurance of copyright if the book (and book here

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covers these letters) be published after the author's death. The terms of copyright, it will be seen, are less favourable in such a case than in the case of a book published in the lifetime of the author. The words are, "copyright in every book which shall be published after the death of its author shall endure for the term of forty-two years from the first publication thereof, and shall be the property of the proprietor of the author's manuscript from which such book shall be first published, and his assigns."

Now I think, having regard to the words of this section, and in particular to the words "from which such book shall be first published," we are bound to construe the words "author's manuscript" in their natural sense as something physical, as the paper with the words inscribed on it, and not as meaning the composition of the author independently of its inscription. The section seems to contemplate the possibility of there being more than one author's manuscript, giving the copyright or right of multiplication of copies after publication to the proprietors of that manuscript of the author from which such copies shall be first published. I say I have come to the conclusion that this is the proper construction of these words, and I have perhaps gone unnecessarily into detail in giving the particular reason which I have just given based upon the words "from which such book shall be first published," because I think I have a much better reason to give, namely, that I cannot conceive any better words by which the Legislature could have expressed the sense that I say the words bear upon their true construction.

Now I am aware that the construction which I have put on these words may involve a race or competition between proprietors of authors' manuscripts, which, prima facie, one would hesitate to suppose was the intention of the Legislature. It may be that some other interpretation of the words "first published" was intended which would avoid any such race or competition. I suggest as a possible construction that if you look at s. 3 of the Copyright Act, 1842, and, indeed, if you look at the whole of the Act, you will see that the Legislature when dealing with copyright in the strict sense of the word, that is, the multiplication of copies after publication, invariably makes it a condition of property in the copyright that the property shall

only follow first publication. That is as plainly so as can be in the case of the author, and it seems to me that what the Legislature may have intended was this, that just as first publication is essential to copyright in the case of the author, so first publication shall be essential to the copyright in the proprietor of the author's manuscript after the author's death. If that is the meaning of these words "first publication," this inference involving race and competition between proprietors of authors' manuscripts would be avoided. But it is not necessary for me to insist upon this construction, because, whatever construction is put upon these words, I have no doubt that author's manuscript in this section means the paper upon which the author's composition has been inscribed, and does not mean the composition independently of that.

Having arrived at this conclusion, there are two other matters which it is necessary for me to deal with. The one is the question of what rights Smith, Elder & Co. acquired under the agreement of March 5. Assuming that I come to the conclusion that they did under that agreement bring themselves within the terms of s. 3 so as to become the proprietors of the author's manuscript from which the book should be first published, and thus obtain the property in the copyright, there is still one more matter to be considered, viz., the somewhat subtle point which was raised by Mr. Danckwerts as to whether this case does not depend, not on the rights of property of copyright as defined by s. 3 in the Act of 1842, but upon Charles Lamb's rights under the statute of 8 Anne. Those are the two questions which I have to consider. [His Lordship referred to the agreement.]

Now, dealing with the first question, it will be seen that under this agreement what Mr. and Mrs. Steeds assigned to Smith, Elder & Co. was this: "All copyright which we possess and the exclusive right of publishing the entire collection of letters and manuscripts of the Lloyd family now transferred to them." Strictly, at the moment of the execution of this document, Mr. and Mrs. Steeds possessed no copyright whatsoever. They were both of them descendants of the Lloyd to whom these letters were written, and all one can say about their possession

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of the documents is this, that they were found in their possession, and that that possession was not unnatural having regard to their relationship. They had not any copyright, but in my view, although they had no copyright, they had documents which, if they were the proprietors of them, gave them the right on publication to acquire the copyright, and, according to my view, "copyright" in this document ought to be read in that sense. It ought to be read as covering the right to acquire copyright which became vested in Mr. and Mrs. Steeds as proprietors of the author's manuscript. That the word "copyright" can be used in that sense is really, to my mind, quite clear, because in s. 2, the definition section (although the section is speaking of the rights of an author, and not of the rights of the proprietor of an author's manuscript as mentioned at the end of s. 3), it is quite plain that the word "copyright" is used to describe, not only a right of somebody after publication, which is copyright in the strict sense of the word, but also a right of the author before publication, which, of course, is not copyright in the proper sense of the word. Therefore I think that there was an intention to transfer that inchoate right.

Then the documents were transferred, and if there had been nothing more than the word "transfer" I should have said that it was perfectly plain Smith, Elder & Co. became the proprietors by transfer of these letters which are the subject of this action. But difficulty is caused by the fact that besides the words of transfer, and the words as to exclusive right of publishing, both of which words are favourable to the right of the plaintiffs in this action, we find the engagement of Smith, Elder & Co. to return these letters so soon as they have been copied. Under those circumstances there is some difficulty in saying that really the property in the letters so passed to Smith, Elder & Co. as to make them the proprietors of the author's manuscript. It looks as if the proprietorship of the author's manuscript continued from first to last the property of Mr. and Mrs. Steeds. And it is really this clause in the agreement which has brought about the whole of this trouble and litigation, because Smith, Elder & Co. having published these letters did, in fact, hand the very letters themselves back to the Steeds, who then sold

them at an auction to the defendant, although at a date subsequent to the publication by Smith, Elder & Co. My conclusion is that that publication by Smith, Elder & Co. from this author's manuscript, of which I will take it that the Steeds were the proprietors, with the assent of the Steeds, did immediately vest the copyright in somebody. Now I think, having regard to the words of this document of March 5, that that vesting was in Smith, Elder & Co.; and it was a vesting in them at a time when nobody claiming under the Steeds as the assign of the Steeds had obtained any right of property such as that which Mr. Dent obtained when he purchased at the sale.

I do not know that I need say any more upon the question of the right of the plaintiffs, but I have still to deal with the other question which was raised by Mr. Danckwerts. He says that Charles Lamb acquired some right of copyright under the statute of 8 Anne or the statute of 54 Geo. 3, which were the statutes in force during the lifetime of Charles Lamb. I do not think that I need go in detail into the provisions of those Acts of Parliament, because in the course of the argument it was admitted that the copyright which is the subject of them was one which could only be acquired after publication, and it was also admitted by both sides that in truth and in fact these letters were not published in the lifetime of Charles Lamb. Of course publication is a word which, when used in reference to copyright, does not bear the same meaning that publication does with reference to libel and defamation, because when one is dealing with that the publication to one man or one person is quite sufficient for the purpose of supporting the action. But when you are dealing with copyright it is not publication to one person but publication to the public which is publication, and it is for that reason that publication to a circle of friends of the author, or even to students to whom the author is lecturing, is not a publication within the meaning of the word "copyright," the publication in such a case really depending on circumstances which are inconsistent with communication to the public in general. And it seems to me that, when one bears in mind this non-publication in the lifetime of Lamb, it is quite plain, using the word "copyright" in the statutory sense of the

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word, that is a copyright obtained after publication, that the statute of Anne cannot possibly apply to the present case. But then it is said there may be another sort of copyright, not the statutory copyright, but a sort of copyright which is the common law right of an author as well before as after publication. My answer to that is that that also cannot apply in the present case, for, whatever were the common law rights of authors before publication, the necessary effect of s. 3 of the Act of 1842 is to determine those rights and to transfer them to the proprietor of the author's manuscript. Of course I am well aware that the Act of 1842 was not the Act in force during the life of Charles Lamb, but still I can find nothing in the Act of Anne which vests in the personal representatives of an author anything except the statutory right created. I find nothing in the Act of Parliament which in any way deals with the vesting of any right of the author in the manuscript if he died without publication and without acquiring a copyright.

It is right when I am dealing with this part of the case that I should mention the case of *White* v. *Geroch* (1), which was alluded to by Mr. Danckwerts. He relied upon that case as shewing that under the statute of Anne, or rather under 54 Geo. 3, c. 156 (which, on this matter, is in the same terms), there was vested some right or other in the author before publication. It seems to me that that is not so. The action was for infringement of a copyright, and the plea was one of not guilty. The point that was made by Mr. Campbell, afterwards Lord Campbell, in arguing the case was, first, as to whether a single sheet would constitute a book, with which I need not trouble myself at all; and secondly, this: "The Act of Parliament enacts, 'that the author of any book which shall hereafter be printed and published, shall have the sole liberty of publishing such book, for twenty-eight years, to commence from the day of first publishing the same.' In this case it was proved, that the author had published the composition in manuscript a year before it was in print. The statute has made the printing a condition precedent; and the plaintiff not having, therefore, complied with that condition, cannot claim any benefit under the statute.

(1) 2 B. & Al. 298, 300.

The printing of the book for the benefit of the public, when it is first published, is the consideration paid by the author for the monopoly conferred upon him." It is quite plain that that argument of Mr. Campbell involved no such proposition as that which Mr. Danckwerts relied upon. When the learned judge, Lord Tenterden, then the Chief Justice, comes to deal with the point he says (1): "Upon the second point, I am of opinion, that the author does not lose his copyright, by having first sold the composition in manuscript; for the statute, 54 Geo. 3, c. 156, must be construed with reference to the 8 Anne, c. 19, which it recites, and which, together with the 41 Geo. 3, c. 107, were all made in pari materia, for the purpose of enlarging the rights of authors. The 8 Anne, c. 19, gave to authors a copyright in works not only composed and printed, but composed and *not printed:* and I think that it was not the intention of the Legislature, either to abridge authors of any of their former rights, or to impose upon them as a condition precedent, that they should not sell their compositions in manuscript before they were printed." It seems to me there is nothing in that judgment to shew that publication, in some form or other, was not a condition precedent to the vesting of the statutory right. I think, therefore, that this appeal fails.

FLETCHER MOULTON L.J. This is an action brought by the plaintiffs on an alleged right of copyright possessed by one of them, Smith, Elder & Co., the other having obtained a licence under that copyright of a somewhat exclusive character. It relates to certain documents which were published in the year 1898, that is to say, since the passing of the Copyright Act, 1842.

Now s. 3 of the Act of 1842 positively enacts in whose ownership the copyright of every book published after the passing of that Act shall be, whether such book be published in the lifetime of the author or after his death, and therefore the plaintiffs, or one of them, must justify their action under the provisions of this section. Mr. Scrutton, on their behalf, admits this, and he says that Smith, Elder & Co. are the proprietors of the copyright in these letters under the provisions of the latter part of s. 3 of

(1) 2 B. & Al. 301.

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the Act of 1842, which applies to the case of publication after the death of the author.

The main question in the case, therefore, turns on the interpretation of this section. Mr. Danckwerts has insisted on going very thoroughly into the question of the common law rights of authors, and I agree that he is perfectly justified in doing so. In interpreting an Act of Parliament you are entitled, and in many cases bound, to look to the state of the law at the date of the passing of the Act—not only the common law, but the law as it then stood under previous statutes—in order properly to interpret the statute in question. These may be considered to form part of the surrounding circumstances under which the Legislature passed it, and in the case of a statute, just as in the case of every other document, you are entitled to look at the surrounding circumstances at the date of its coming into existence, though the extent to which you are allowed to use them in the construction of the document is a wholly different question. So that, in my opinion, it is permissible in the present case to look into the law as to the rights of authors as it stood under the common law and under the then existing statutes when the statute of 1842 was passed. But I wish to guard myself by saying that there is no presumption that the law as it then existed was preserved by the statute. You have to examine the language of the statute without any bias of that kind in order to get at its true interpretation.

Now it is beyond question that the common law recognized in an author a property in his composition so long as he kept it to himself. But that property was lost by publication. It was not necessarily lost by communication. He might hand the manuscript of his composition to a friend confidentially, or he might even give the manuscript to a friend without the transaction having any confidential character, and the law did not hold that by doing so he must necessarily have denuded himself of his property in the literary composition itself. It thus contemplated a property in a composition independently of the property in the manuscript in which that composition was to be found. This must have been thoroughly well known to all who had occasion to consider the rights of authors under our law. Indeed in one

case, which is probably the one that most frequently gives rise to discussion, namely, letters, the law leant to the presumption that (at all events in the case where there was any scope for literary property in the letters) the sending of the letter did not denude the writer of his property in the composition. It also recognized that the author of a letter might have other rights of a totally different character, which would enable him to prevent a misuse of the letter by the person to whom it was sent and whose property it became. Such grounds as that the letter was confidential, that the matter therein was secret, that it was an abuse of trust to allow it to be published, were grounds on which the writer of the letter might, quite independently of any question of property, interfere with the unlimited use of the letter by the person who received it. But, fortunately, no such question as would be raised by such latter considerations occurs here, seeing that the writer had been long dead when these letters were first published.

The statute law as it existed immediately prior to the Act of 1842 had added very considerably to the rights of authors in their own compositions. There were three Acts—one in the reign of Anne and two in the reign of George III.—which thus increased the rights of authors. They are all very similar in their provisions, for although the two later Acts increased the term for which protection was given, they did not vary the character of the protection from that which was given by the original statute of Anne to which I wish to refer. That statute provides that the author of a book composed after the date of the Act, and his assigns or assignees, shall have the sole liberty of printing and of reprinting such book or books for a term of fourteen years, to commence from the day of first publishing the same, and no longer. I do not care to inquire as to whether or not that increased the copyright, or perhaps I had better say the rights of the author before publication. I do not differ in any way from what the President of the Court has said on this point, but for reasons which will presently appear, I do not think it is necessary to enter into the question.

Now that was the state of the law when the Act of 1842 was passed. The property in all books published after that date is

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positively fixed by the provisions of s. 3 of that statute. Unquestionably this was a change in the law, and with regard to books not published in the lifetime of the author, it was a completely new departure. It provides that "The copyright in every book which shall be published after the death of its author shall endure for the term of forty-two years from the first publication thereof" (a considerable extension in the length of the time), "and shall be the property of the proprietor of the author's manuscript from which such book shall be first published, and his assigns." For the purpose of making more clear the positive character of that enactment I will substitute for the word "copyright" its interpretation as given by the definition clause. The latter half of s. 3 then reads as follows, "and that the sole and exclusive liberty of printing or otherwise multiplying copies of every book that shall be published, after the death of its author shall be the property of the proprietor of the author's manuscript from which such book shall be first published and his assigns." This is an absolute enactment that the proprietor of the author's manuscript from which the book is first published shall have the sole and exclusive privilege of printing it for forty-two years. I agree with the President of the Court that this means the proprietor in the sense of the person who owns the document. I consider that the Legislature could not have used clearer words to express that meaning. Here we see the importance of considering the state of the law at the date at which the Act was passed. It was passed by a Legislature which must be assumed to have known that by the common law a distinction was drawn between property in the document and the author's right to the literary composition. Knowing this, it uses language in the first part of the section which relates to a publication during the life of the author, which shews that the source of copyright in that case is the author and that ownership of the copyright must be derived from him. In the latter part of the section which relates to a publication after the death of an author, it uses language which shews that the source of copyright in that case is the owner of the manuscript, and that ownership of the copyright must be derived from him. That being so, I have no doubt whatever that the interpretation put

upon this part of the clause by the learned judge in the Court below is correct. Mr. Danckwerts asks us to treat it as though it meant the author and those who derive from him by reason that the author had at common law a right in the literary composition apart from the document. That would be to say that we ought to interpret the last portion of the section as though the words were "shall belong to the author and his assigns," the very words which are to be found in the first part of the clause, and which are replaced by such strikingly different words in the latter part.

Speaking for myself, I do not feel any difficulty with regard to the words "first published," although I must admit the force of the language of the President of the Court when he speaks of a race between people who own manuscripts. I think all that was meant was this: if you are the owner of an author's manuscript, and you publish from it, and are the first to publish, you have a complete title; and the fact that some other person had a manuscript from which he might have published earlier than you, and thus have prevented you from getting the copyright, is not a circumstance that invalidates your title. You have only to prove first publication from a legitimate manuscript, and that is sufficient to establish your copyright. That being so, it appears to me that Smith, Elder & Co. will have established their title under the Act of 1842 if they can shew that they were the proprietors of the manuscript under which the publication was made. But here Mr. Danckwerts raises an ingenious point to the effect that clause 1 of the Act of 1842 protects existing rights; that Lamb composed these letters at a period when the Act of Anne was in force, and therefore, if he had published them, he would have had the copyright thereby given. He says s. 1 of the Act preserves existing rights, and, therefore, this right to get the privileges given by the statutes of Anne and George III. is preserved and goes to his executors. I think that Mr. Danckwerts has misunderstood the effect of the saving clause in the 1st section of the Act of 1842. The Act of 1842 did two things. It established a new copyright law, and it wiped out all the old statutes relating to copyright. For the sake of clearness I will use the phrase "it had an enacting part and it

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had a repealing part." The enacting part must have full force given to it whatever be the pre-existing statutes. If its provisions are contrary to those of the Act of Anne, those provisions, being in a later Act, override and pro tanto extinguish the provisions of the earlier statutes. But, apart from this, the repealing part wiped those earlier statutes off the statute book. The consequence of this would have been that all the rights which had been created under them and had not yet expired would have been wiped out. The enacting part of the Act of 1842 relates only to books published after that date; but if the preceding statutes had been wiped out simpliciter, all the books published before that date which were then in the enjoyment of copyright would have lost their privileges. That was not intended. Accordingly, in the 1st section, which is a repealing section, the following words are added, that those statutes "be and the same are hereby repealed, except so far as the continuance of either of them may be necessary for carrying on or giving effect to any proceedings at law or in equity pending at the time of passing this Act, or for enforcing any cause of action or suit, or any right or contract, then subsisting." For those purposes the repealed statutes may be treated as being still on the statute book. But, whether they had been left on the statute book or taken off, s. 3 of the Act would have overridden them. In other words, that saving clause has nothing whatever to do with the enacting part of the Act. It is only to prevent an unintended effect following from what I might call the physical repeal of the previous Acts. If you want to see the saving clause that relates to the enacting part of the Act you must turn to s. 28, which says: "Provided also, and be it enacted, that nothing in this Act contained shall affect, alter, or vary any right subsisting at the time of passing of this Act, except as herein expressly enacted; and all contracts, agreements, and obligations made and entered into before the passing of this Act, and all remedies relating thereto, shall remain in full force, anything herein contained to the contrary notwithstanding." Contractual relations are untouched. Rights subsisting at the time of the passing of the Act are altered only so far as therein expressly enacted. But s. 3 is an express

enactment as to copyright in future books, and there is not a word in s. 28 which prevents a rigorous application of the provisions of s. 3 to every book published after the date of the passing of the Act.

The plaintiffs therefore will establish their right if they can shew that they were proprietors of the author's manuscript from which the first publication of these letters took place or derive their title from such proprietor. There is no question that their publication was the first one. The question is whether these letters were their property at that date. This turns on the interpretation of the agreement of March 5, 1895, and it is the only part of the case which has caused me any doubt. The point is absolutely destitute of merit. As between Mr. and Mrs. Steeds and Smith, Elder & Co. there is not the slightest doubt that there was the intention to convey the copyright, whether or not it was called copyright in the agreement, and I have no doubt Mr. and Mrs. Steeds would say that this was their intention just as much as would Smith, Elder & Co. But the difficulty that I have felt is this. The latter part of s. 3 enacts who is the person who can acquire a copyright in a book after the death of the author, and by what means he is to do it. He must be the proprietor of the author's manuscript, from which it is first published. I feel some doubt as to whether a man can by any document give another person the right to proceed under such a provision unless the effect of that document is to make him proprietor. I think the word "proprietor" is here used, as it naturally would be used in the statute, in its ordinary sense, and if Smith, Elder & Co. were not at the moment the proprietors of the manuscript I do not see how anybody could qualify them to take advantage of the provisions of the section. But when we look at the agreement fairly I think the difficulty disappears. I am not deciding that it cannot be read as giving to Smith, Elder & Co. a real ownership limited in time. I am inclined to think that it may do so, and although an ownership that is only ad hoc might not satisfy the statute, its requirements would be met if the agreement made them the owners until publication. But the way in which I prefer to read this agreement is as follows: "Mr. and Mrs. Steeds assign to Smith, Elder & Co. all

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copyright which they possess." Technically that is inaccurate. It was not a then existing copyright. I think they probably meant their interest in copyright in the sense in which the President of the Court has pointed out that the word is used in s. 2 of the Act. They go on to assign the exclusive right of publishing these letters. Now they were in this position. They had the sole author's manuscript. They had only to take certain steps, either themselves or by someone else, that is to say, to publish, and the exclusive right of publishing would become vested in themselves. They assigned that exclusive right of publishing (which did not then exist) and they gave these documents to Smith, Elder & Co. to perform the necessary acts which would make it exist, and I think the fair meaning of this agreement is, "Complete the inchoate right until it becomes the exclusive right of publishing, and then it is yours." It is immaterial to consider whether the copyright on publication momentarily came to Mr. and Mrs. Steeds, because if it did so it was under this agreement instantaneously passed on to Smith, Elder & Co. It is possible that on the strict interpretation of s. 3 the publication legally vested the copyright in Mr. and Mrs. Steeds, but they had by a previous document agreed that it should pass to Smith, Elder & Co. In my opinion, therefore, Smith, Elder & Co. thereupon became by assignment the possessors of the copyright which Mr. and Mrs. Steeds had got by first publication from a manuscript of which they were proprietors. Smith, Elder & Co. duly registered their copyright, and are now the rightful possessors of it. I therefore think their title is well founded.

With regard to Macmillan & Co., I wish to say for myself that I do not think they were improperly joined. It is possible that on the question of damages their rights might be material. Between Macmillan & Co. and Smith, Elder & Co. the whole legal and beneficial possession of the copyright rests. But unquestionably Messrs. Macmillan & Co. have some interest in the copyright although they are not the owners of it, and inasmuch as joining them has not occasioned any embarrassment to the defendant, it was not a wrong thing to join them as plaintiffs ex abundanti cautela.

BUCKLEY L.J. Charles Lamb in his lifetime wrote and sent to Robert Lloyd certain letters. He died in the year 1834, and down to the time of his death no publication of these letters had been made. It is not disputed between the parties that these letters were literary compositions such as could be the subject of copyright. Nothing further material took place until the year 1895. At that date the letters were in the physical possession of Mr. and Mrs. Steeds. It is said, but has not been proved, that each of those two persons was a descendant of the Lloyd who was the recipient of the letters. Suffice it to say that in 1895 the letters were in their possession, and that the appellant does not dispute that they were at that date the lawful owners of the bits of paper. On March 5, 1895, the Steeds signed a certain agreement in favour of the plaintiffs, Smith, Elder & Co., assigning to them "all copyright which we possess and the exclusive right of publishing . . . . the letters now transferred to them." They handed over the letters to Smith, Elder & Co., the latter undertaking to return them when copied. The effect of this agreement and of what was done under it I think was that the Steeds gave to Smith, Elder & Co. the possession of and property in the letters for the purpose that Smith, Elder & Co. might publish and obtain the copyright and then return the possession and property to the Steeds. The agreement speaks of the letters as "transferred." There are no words actually expressing a transfer, but the effect is the same, for the language of the document is "assign to them all copyright which we possess and the exclusive right of publishing the entire collection of letters and MSS. of the Lloyd family now transferred to them." In my view the property in the letters passed for the purposes which I have stated. But if, contrary to my opinion, the property in the letters themselves did not pass, then I agree with my learned brethren that the agreement at any rate transferred the right, which the Steeds had, to acquire copyright by publication. The statute of 1842 contemplates that there may be such a transfer, because it speaks of an assignment of the interest of the author in copyright before publication. Smith, Elder & Co. published the letters. The question for decision is whether they thus became the owners of the copyright.

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At the date of Charles Lamb's death the statute which was in force relating to copyright was the 8 Anne, c. 19. It has been strenuously argued before us that, notwithstanding there had been no publication down to the date when that Act was repealed by the Act of 1842, there was nevertheless in existence in 1842 and vested in Charles Lamb's legal personal representatives a copyright in these letters, and that that right was saved by the last words of s. 1 and by s. 28 of the Act of 1842. In my opinion there was no such copyright in existence in 1842. Under the statute of Anne the author of a book "composed and not printed and published" (which is the present case) is given the sole liberty of printing for fourteen years to commence from the day of the first publishing the same. Until publication there is no copyright. *White* v. *Geroch* (1) was strenuously pressed upon us as a decision to the contrary. That case was decided in 1819, and is a decision upon the statute of Anne and certain subsequent statutes of George III. upon which I need not pause to comment. The facts were that publication had been made by selling several thousand copies in manuscript. This had been done a year before printing. The question argued and decided was whether printing was under the statute of Anne a condition precedent to copyright. The decision was that the statute of Anne gives a copyright in works composed and not printed, not that it gives a copyright in works not published. In other words, publication by the circulation of manuscript copies does not destroy the right to copyright for that printing is not a condition precedent to copyright under the statute of Anne. For the present purpose there is nothing else in the case.

When the Act of 1842 was passed there was, therefore, no subsisting copyright which was saved by the saving clauses of that Act. The question to be resolved is thus reduced to the determination of the true meaning of the last words of s. 3 of the Act of 1842. The copyright in a book published after the death of the author is by those words constituted "the property of the proprietor of the author's manuscript from which such book shall be first published, and his assigns." We have been

(1) 2 B. & Al. 298.

pressed with a metaphysical distinction which it has been sought to draw between the author's manuscript in the sense of the sheets of paper with words written upon them and the literary composition whose expression is found in those written words. It has been argued that the author's manuscript means the abstract thing, that is, the literary composition, as distinguished from the concrete thing, meaning the expression of that literary composition in characters upon paper. I agree that there exists in an author a right of property in the literary composition, the abstract thing, as distinguished from the concrete thing, the words written upon the paper. The decision of Lord Hardwicke in *Pope* v. *Curl* (1), as understood and explained by Sir Thomas Plumer in *Lord Perceval* v. *Phipps* (2), rests no doubt upon this, that as between the writer and the addressee of a letter, notwithstanding the fact that the latter is entitled to the letter, meaning the paper on which it is written, yet the writer has a right of property in the letter based upon his right as composer. The writer retains the rights flowing from authorship. He does not by sending the letter to the addressee authorize him to publish it. As Lord Cairns said in *Hopkinson* v. *Lord Burghley* (3), the writer is supposed to intend that the receiver may use it for any lawful purpose, but publication is not such a lawful purpose. Charles Lamb, therefore, and after his death his legal personal representatives, had no doubt certain rights of property in these letters, viz., those which result from the fact that Charles Lamb was their author, and I agree that a determination of the statutory right of copyright does not exhaust the rights. There exist at common law in the writer of a letter certain rights apart from copyright, such as, for instance, the right to restrain the receiver from publishing the letter. Instances of the successful assertion of this right are found in *Duke of Queensberry* v. *Shebbeare* (4) and *Gee* v. *Pritchard* (5) ; and reference may be made to *Lord Perceval* v. *Phipps* (2) and *Caird* v. *Sime*. (6). But the right to restrain the receiver from publishing is one thing, the right in the author himself or his representatives to publish and obtain copyright is

(1) 2 Atk. 342.
(2) 2 V. & B. 19.
(3) L. R. 2 Ch. 447.
(4) 2 Eden, 329.
(5) 2 Swans. 402.
(6) 12 App. Cas. 326.

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another. It is the latter we have to consider, and the latter is governed wholly by statute.

It remains then only to determine what is the true meaning of the words "the proprietor of the author's manuscript." In my judgment the author's manuscript is not the abstract thing, the literary composition, but the concrete thing, the paper upon which the idea is expressed. It is from the latter, not the former, that the book can be published. That which can be the subject of property is the expressed thought, not the unexpressed thought, and for the purpose of copyright it is the thought expressed in writing to the exclusion of the thought expressed orally. Further, as regards the thought expressed in writing, the author's manuscript is the concrete written thought, not the abstract thought as distinguished from the written. In my judgment the author's manuscript is the written paper which forms the concrete expression of the literary composition.

The same result is arrived at by another course of reasoning. The earlier part of s. 3 gives the copyright in the book, published during the author's lifetime, to the author and his assigns, and the word "assigns" is by s. 2 construed to mean "every person in whom the interest of an author in copyright shall be vested, whether derived from such author before or after the publication of any book, and whether acquired by sale, gift, bequest, or by operation of law, or otherwise." The latter part of s. 3 uses different words, namely, "shall be the property of the proprietor of the author's manuscript from which," &c. The argument of the appellant, if successful, would reduce these latter words to meaning the same thing as is expressed by the words "the author and his assigns" in the first alternative of s. 3. Further, s. 16 of the Act is accurate if the appellant is wrong, but not if he is right. The person there spoken of as claiming copyright is called the author or first publisher. It is plain to my mind that where the author is dead the right to copyright is to be traced, not from the author, the person who composed the literary composition, but from the first publisher of the author's manuscript. I need not trouble myself with a question of difficulty which has been suggested in case there

are several authors' manuscripts. Not that I feel much difficulty about it if that case arises, but it does not.

I desire only to add that I do not feel pressed with any difficulty based upon the argument that it may result from this view of the Act that after the writer's death the addressee of the letter could publish notwithstanding objections raised by the author's representatives, thus exposing the writer and his family to disclosure of documents which might be private and confidential. It does not follow because the copyright if there be publication will be in the person who, being proprietor of the author's manuscript, first publishes that that person is entitled to publish. The common law right to which I have referred would be available to enable the legal personal representatives under proper circumstances to restrain publication.

I agree that the appeal should be dismissed with costs.

Solicitors: *Surr, Gribble & Oliver, for S. Hosgood, Pershore; Broad & Co.*

H. C. R.

C. A.
1906
Oct. 29, 30, 31;
Nov. 20.

In re BODEN.
BODEN *v.* BODEN.

[1906 B. 561.]

Will—Annuity—Direction to Pay out of Income—Alternative Gift—Charge on Corpus—Continuing Charge on Income.

A testator gave all his residuary real and personal estate to trustees upon trust for sale and conversion and investment, and to hold the same "In case I shall leave any child living at my decease then upon trust to pay to my said wife during her life and so long as any child of mine shall be living such a sum out of the income of my residuary trust funds as with the income which my said wife shall from time to time receive under or by virtue of the settlement made on our marriage shall make up the total annual income of 8000*l.* But in case I shall leave no child surviving me or leaving such every such child shall die in the lifetime of my wife then upon trust to pay to her during her life such further sum as with the income to be derived from the said settlement shall make up the annual sum of 10,000*l.* and I direct that the said annual sums of 8000*l.* or 10,000*l.* as the case may be shall be deemed to commence and be payable as from my death and subject to the trusts aforesaid in trust to divide my said residuary trust funds unto and equally between all and every my children" who shall attain twenty-one or marry. "But in case I shall leave no child surviving me who shall take a vested interest in my said residuary trust funds then subject to the trusts aforesaid I give and bequeath the same to my nephew H." There was no child of the marriage, and the income of the testator's residuary estate was insufficient to pay the annuity:—

Held by Vaughan Williams and Buckley L.JJ. (dissentiente Fletcher Moulton L.J.), that the direction to pay out of income, though expressed only in the case of the 8000*l.* annuity, applied also to the 10,000*l.* annuity, and that this direction charged the annuity only on income during the widow's life, and did not create either a charge on the corpus or a continuing charge on the income.

Walter Boden by his will dated December 7, 1904, after giving certain charitable and pecuniary legacies, including a legacy of 500*l.* to his wife, gave all the furniture and chattels which should be in or about his residence at his death to trustees upon trust to permit his wife to possess, use and enjoy the same during her life, and after her death he declared that the same should sink into his residuary estate, and he gave his

mansion-house known as the Pastures and the lands belonging thereto to his trustees upon trust for his wife for life, and after her decease he directed that the same should fall into his residuary estate; and he gave all the rest, residue, and remainder of his real and personal estate upon trust for sale and conversion as therein mentioned, and out of the proceeds to pay his funeral and testamentary expenses and debts, and to invest the residue of the said moneys and "to stand possessed of the said residuary trust moneys and the investments for the time being representing the same (hereinafter called the residuary trust funds) Upon the trusts and for the purposes hereinafter expressed that is to say In the first place to pay and discharge the interest on any mortgages that may be subsisting on my Pastures estate it being my wish that my said wife shall have the unincumbered income of such Pastures estate during her life And in the next place In case I shall leave any child living at my decease Then upon trust to pay to my said wife during her life and so long as any child of mine shall be living such a sum out of the income of my said residuary trust funds as with the income which my said wife shall from time to time receive under or by virtue of the settlement made on our marriage shall make up the total annual sum of 8000*l.* But in case I shall leave no child surviving me, or leaving such every such child shall die in the lifetime of my wife, then Upon trust to pay to her during her life such further sum as with the income to be derived from the said settlement shall make the total annual sum of 10,000*l.* and I direct that the said annual sums of 8000*l.* or 10,000*l.* as the case may be shall be deemed to commence and be payable as from the date of my decease And subject to the trusts aforesaid In trust to pay and divide my said residuary trust funds unto and equally between all and every my children who being sons or a son shall attain the age of twenty-one years or being daughters or a daughter shall attain that age or marry under that age But in case I shall leave no child surviving me who shall take a vested interest in my said residuary trust funds then subject to the trusts aforesaid I give and bequeath the same to my nephew Henry Walter Degge Shuttleworth Boden for his own use and benefit." The will contained the usual power of

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advancement, and a power for the trustees to postpone sale and conversion and to carry on the testator's business either in partnership with the persons who should be his partners at his death or otherwise.

The testator died on September 16, 1905, leaving his wife him surviving. There were no issue of the marriage. The income received by Mrs. Boden under the marriage settlement was about 1150*l.* a year. The settlement contained a covenant by the testator to make this income up to 1500*l.*

The testator's income from his business for some years before the date of his death had been 11,000*l.* and upwards, but on his death his partners paid out his share of capital under the provisions of the partnership deed, and the result was that his net residuary estate was only of the value of 68,000*l.*, and wholly insufficient to provide out of income the sum required to make up the widow's income to 10,000*l.* a year.

This summons was taken out by the trustees for the determination of the questions whether, on the true construction of the testator's will, the annuity of 10,000*l.* thereby directed to be paid to the widow, or so much thereof as for the time being should be payable, was (*a*) charged upon the corpus of the testator's estate, or (*b*) charged as a continuing charge in favour of the defendant, her executors or administrators, on the income of the estate until all arrears thereof should have been paid in full. The widow and the nephew were made defendants.

The case came before Joyce J. on June 21, 1906, and he decided that the annual sum necessary to make up the widow's income to 10,000*l.* a year was a charge upon the corpus of the testator's residuary estate.

The nephew appealed.

Levett, K.C., *Younger, K.C.*, and *Christopher James*, for the appellant. The amount necessary to make up this 10,000*l.* annuity is payable out of income; as a question of construction the words "out of income" in the earlier part of the gift apply to the alternative trust to make up the annuity to 10,000*l.* in the event of there being no children. The larger annuity is substituted for the smaller in an event which has happened: the

general rule as to a substitutionary gift being subject to the same conditions as the original gift does not depend on the original gift being by will and the substituted gift by codicil—*In re Boddington* (1)—but from the natural inference from a gift being given by way of substitution or in lieu of another. The substituted gift is as a rule subject to the same conditions and payable out of the same fund as the first gift: *Leacroft* v. *Maynard* (2); *Crowder* v. *Clowes*. (3) The fact that the second gift is not in terms expressed to be in substitution for the first makes no difference: *Johnstone* v. *Earl of Harrowby*. (4)

[VAUGHAN WILLIAMS L.J. referred to *In re Mores' Trust* (5) and *Haley* v. *Bannister*. (6)

BUCKLEY L.J. *Johnstone* v. *Earl of Harrowby* (4) appears to have been followed in *In re Smith* (7), *In re Gibson's Trusts* (8), and *Fisher* v. *Brierley*. (9)]

There never was any intention to charge either of these annuities on corpus; the first is expressly made payable out of income, and the second, also payable out of income, is substituted for it in a certain event.

Upjohn, K.C., *Hughes, K.C.*, and *Vaughan Hawkins*, for the respondent. The 10,000*l.* annuity is an independent alternative gift; there is nothing in the will to indicate that it is to be payable only out of income: it is probable that the testator did not mind this annuity being made up out of corpus if, as has happened, there were no children. In this will there are two several distinct gifts mutually exclusive. *Johnstone* v. *Earl of Harrowby* (4), *Leacroft* v. *Maynard* (2), and *Crowder* v. *Clowes* (3), relied on by the appellant, were all cases of a will and codicil, or codicil followed by a later codicil, and throw no light on the present case, where both gifts are in the same instrument and are unconnected.

These annuities are both charged upon the whole estate, which is given over, "subject to the trusts aforesaid," to the children or the nephew; the corpus, therefore, is at the least liable to make

(1) (1884) 25 Ch. D. 685, 689.
(2) (1791) 1 Ves. Jun. 279; 3 Bro. C. C. 233.
(3) (1794) 2 Ves. Jun. 449.
(4) (1859) 1 D. F. & J. 183.
(5) (1851) 10 Hare, 171.
(6) (1857) 23 Beav. 336.
(7) (1862) 2 J. & H. 594, 600.
(8) (1861) 2 J. & H. 656.
(9) (1861) 30 Beav. 267.

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up the deficiency of the 10,000*l.* annuity: *Phillips* v. *Gutteridge* (1); *Birch* v. *Sherratt* (2); *Ex parte Wilkinson.* (3)

[VAUGHAN WILLIAMS L.J. referred to *Foster* v. *Smith* (4) and *Phillips* v. *Gutteridge.* (5)]

We go so far as to contend that the 8000*l.* annuity is a continuing charge on the income, which is equivalent to a charge on corpus, for there is nothing to shew that this annuity is to be confined to the income of each year; if this is so, then, even according to the appellant's construction, the 10,000*l.* annuity would in like manner be a continuing charge on the income, and the arrears would be a continuing charge after the death of the annuitant: *Booth* v. *Coulton* (6); *Forbes* v. *Richardson.* (7)

George Lawrence, for the trustees.

Levett, K.C., in reply. The cases cited to shew that there is a charge on the corpus, or a continuing charge on the income, are all cases where the charge is on rents and profits, which words have a special legal meaning as part of the real estate, or there are such words as "levy and raise," or there is a gift over in terms "subject to payment of the annuity" or words which were held equivalent. There is no case where the words "pay out of income" have been construed not to mean what they say. *Foster* v. *Smith* (4) is in my favour, but it has the words "rents and profits." *Ex parte Wilkinson* (3), *Forbes* v. *Richardson* (7), and *Phillips* v. *Gutteridge* (1) all depended on the words "rents and profits." In *Birch* v. *Sherratt* (2) the gift over was "after the payment of the said annual sum and subject thereto," and in *Booth* v. *Coulton* (6) the words "subject as aforesaid" were held to have the same meaning. In the present case the words of the gift over are "subject to the trusts aforesaid." Those words are merely referential, and cannot change the trusts or give a charge on the corpus unless it is given already. The gift over to the children, which vests at twenty-one, is wholly inconsistent with a continuing charge on the income which

(1) (1862) 3 D. J. & S. 332.
(2) (1867) L. R. 2 Ch. 644.
(3) (1849) 3 De G. & Sm. 633.
(4) (1845) 1 Ph. 629.
(5) (1859) 4 De G. & J. 531.
(6) (1870) L. R. 5 Ch. 684.
(7) (1853) 11 Hare, 354.

would lead to the whole income being paid to the widow's executors for years after her death.

Cur. adv. vult.

Nov. 20. VAUGHAN WILLIAMS L.J. Joyce J., in his judgment declaring that the annuity which the testator directs by will to be paid to his wife is charged upon the corpus of his residuary estate, seems to rest his decision mainly upon the conclusion that the trust "to pay such further sum as with the income to be derived from the said settlement shall make up the total annual sum of 10,000*l.*" is a trust independent of and not connected with the trust to pay his wife during her life and so long as any child of his should be living "such a sum out of the income of my said residuary trust funds as with the income which my said wife shall from time to time receive under or by virtue of the settlement made on her marriage shall make up the total annual sum of 8000*l.*"

I cannot agree in this conclusion. I think that although the first mentioned trust in the will was only to continue so long as any child of the testator should be living, and although the secondly mentioned trust was a trust only to take effect in case the testator should leave no child surviving him, or leaving such every such child should die in the lifetime of his wife, yet there is a plain connection between the two trusts. The testator was making provision for his wife after his death, and varied that provision according as his wife should or should not bear him children who should survive him and attain the age of twenty-one. I cannot find in this will two independent alternative gifts not connected with one another. I think, on the contrary, that we have here one provision for the wife in the shape of an annuity. The result is that in my opinion the words "out of the income of my said residuary trust funds, &c.," govern both the connected clauses of the entire trust for the wife's provision, and that the charge to secure the 10,000*l.* annuity is governed by those words, and it cannot be charged on the corpus by reason of the omission of those words in the 10,000*l.* clause varying the wife's provision in the case of there being no children or of all such children failing to attain the age of twenty-one.

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But it is said that even if both clauses are governed by the words "out of income, &c.," yet the annuity is charged either on the corpus of the residuary trust estate or on the income thereof until the full annual sum of each year's annuity has been paid.

The case of *Birch* v. *Sherratt* (1) throws some light on that contention. [His Lordship stated the terms of the will in that case, and continued:—] The income of the whole estate being insufficient to pay the annuity, it was held (reversing the judgment of Stuart V.-C.) that the deficiency must be paid out of corpus; but Lord Cairns held (dubitante Rolt L.J.) that the terms in which the annuity was given would not, apart from the terms of the gift over, have been sufficient to charge it on the corpus or on the income accruing after the death of the annuitant. It seems to me that the decision in that case depended, so far as the judgment of Lord Cairns is concerned, entirely on the terms of the gift over, which was a gift not "from and after the death of the annuitant," but "from and after satisfaction of the annuity and subject thereto." In the present case the gift over is, "subject to the trusts aforesaid," in trust to pay and divide between the testator's children who should attain twenty-one or marry, and if there should be no such child, "then subject to the trusts aforesaid I give and bequeath the same unto my nephew." I think that in this will the words "subject to the trusts aforesaid" mean subject to the payment of the annuity out of the income of the trust fund, and do not mean subject to full satisfaction of the annuity.

If I had thought, which I do not, that the gift over to the nephew was to take effect only after full payment of the annuity, I should, notwithstanding the words "out of income," have construed the will as charging the wife's annuity on the corpus, or as creating a continuing charge on the income as the case might be.

Of course every will must be construed by what one finds within the four corners of it, and a decision on the construction of one will is not a decision on the construction of another will. I think that in the present case the whole will seems to

(1) L. R. 2 Ch. 644.

lead to the conclusion that the testator meant to give his wife a life interest in whatever he gave her, whether annuity or otherwise, with remainders over; and that the will should not be construed as giving a legacy of an annuity and a residuary bequest. It is to be observed that the present will does not contain the words "levy and raise," upon which Rolt L.J. put some reliance in his judgment in *Birch* v. *Sherratt*. (1) I think this will means that the wife is to have the annuity, whether 8000*l*. or 10,000*l*., out of income.

The case of *Booth* v. *Coulton* (2) was pressed upon us by counsel for the respondent. It is a decision upon another will which in no way affects the decision of the present case. Three annuities for life were all payable out of income of a trust estate, and, "subject as aforesaid," the income was to be held on trust for George Booth during his life, and after the decease of George Booth the residue was given to Philip Booth. The income was insufficient, and on the death of one annuitant considerable arrears were due on all the annuities, including that of the deceased. George Booth (the tenant for life) was still living. It was held by Giffard L.J. that the income was to be applied in the first place in paying the arrears of all the annuities rateably, and then in paying the annuities of the surviving annuitants. This case, it is true, does charge the arrears of the annuity of the dead annuitant on the future income pari passu with those of the two surviving annuitants. But the tenant for life, George Booth, was alive, and the gift over of the corpus was only to take effect on his death. There was nothing to shew that the annuity was to be confined to the income accruing in each and every year, nor was there anything in the will about the annuities being paid out of income or profits accruing during the lifetime of the annuitant. There is no difficulty in the case so far as the arrears which were held to be payable out of income are concerned. The difficulty, if any, only arises on the question whether it ought to have been held that the arrears would be a continuing charge on the income, not only during the annuitant's life, but after his death. It will be observed that Giffard L.J. refused to declare the annuity a charge on the corpus.

(1) L. R. 2 Ch. 644. (2) L. R. 5 Ch. 684.

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I think that in the present case the decision of Joyce J. declaring that the annuity of Mrs. Boden is charged on the corpus of the testator's residuary real and personal estate is wrong, and that this appeal ought to be allowed with costs. And on the question whether we ought to hold that the arrears would be a continuing charge on the income, not only during the annuitant's life, but after Mrs. Boden's death, I think that the logical consequence of holding that the gift over would take effect immediately upon her death is that there would be no income upon which the arrears of her annuity would be charged.

FLETCHER MOULTON L.J. In the present case I have the misfortune to be of a different opinion from my learned brethren, and as the points involved, though relating directly to this will alone, raise questions of general importance in the construction of wills, I feel it necessary to deal with them specifically. [The Lord Justice stated the facts as to the testator's income and the gifts in the will preceding the gift of residue, and proceeded:—]

The residuary estate includes the whole of his other property and is left to his trustees, and is spoken of throughout as his residuary trust funds. It is with the provisions of the will regarding the disposition of such residuary trust funds that we are concerned.

As is usual in wills, the testator contemplates and provides for the possible occurrence of more than one alternative event in the future. The alternatives in the present case turn entirely on the contingency of the existence of issue surviving him, and he provides for the eventuality of his leaving such issue and the period during which they shall be living by one set of dispositions, and for the case of his wife surviving him and any issue he may leave by another and distinct set. As I have already stated, there was no child of the marriage, so that it is these latter provisions with which alone we have to deal.

Let me first examine the provisions as to the disposition of the residuary trust funds which take effect under the circumstances that have actually happened, and which I may conveniently term the "operative provisions." It is these, and these alone, that now regulate the distribution of the testator's estate; no others

have any effect, and it is according to the proper construction of these operative provisions that the estate must be administered. These operative provisions are as follows:—The testator leaves his residuary trust fund to his trustees upon trust in the first place to pay the interest upon a certain mortgage, and in the next place upon trust to pay to his wife during her life such further sum as with the settlement income should make up the annual sum of 10,000*l.* And he directs that the said annual sum of 10,000*l.* shall be deemed to commence and be payable as from the date of his decease, and subject to the trusts aforesaid he gives and bequeaths such residuary trust funds to his nephew.

I have here given in extenso all the operative provisions of the will which are material to the decision of the case. Construed by themselves they are both simple and clear. Their interpretation admits of no controversy. They give to the wife for life a fixed income of 10,000*l.* per annum, payable out of the residuary trust funds from whatever source they arise, and leave the remainder to the nephew. When thus taken by themselves there is no word in these provisions which gives rise to the slightest difficulty of construction. The word "further" (about which so much was said in the argument of counsel for the appellant) is used in a natural and ordinary fashion as applying to the additional sum required to make the income from the settlement up to the fixed sum of 10,000*l.*

This is the interpretation which the learned judge has adopted, and in my opinion he was right. I can see no reason why we should depart from the plain meaning of these operative provisions.

But it must not be supposed that I consider the fact that the operative provisions when thus isolated bear this meaning is itself decisive of the case. The words have to be interpreted as they appear in their setting in the will, and although the will clearly directs that these dispositions, and these only, shall take effect in the circumstances that have occurred, it may be that the context of the will may shew that some word or some expression in these dispositions must be taken in a sense other than its ordinary and normal sense, or that the whole is qualified by some overriding direction that obliges the Court to reject or

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vary the natural interpretation of the language used. Speaking for myself, I can see no ground for the contention that the presence in the will of the provisions which under existing circumstances are, and are directed by the will to be, inoperative justifies or excuses any departure from the plain meaning of the language of the operative provisions. They deal with the case in which there is issue surviving the testator, and apply so long only as such issue is living. All pains are taken to shew by the form of the will that this case is dealt with separately from the alternative case of no living issue. The exact frame of the dispositions is as follows. [His Lordship read them.] The two trusts are enumerated, not as being modifications the one of the other, but as independent trusts arising under mutually exclusive conditions.

There is no word in the operative provisions which refers to or depends upon those that have now ceased to have effect. There was a strenuous attempt on the part of counsel for the appellant to establish that the word "further" in the latter provisions has some occult reference to what has gone before. In my opinion this is unsustainable. The word "further" essentially conveys the idea of something beyond or additional. It cannot, therefore, refer to what has gone before, because it is conceded that the first gift does not take effect in the case in which the second is operative, so that the sum of 10,000*l.* in the latter cannot in any sense be additional to the sum of 8000*l.* in the former. The language of the two gifts is so independent that the amount of the gift in the second alternative is, if I may so phrase it, calculated independently by reference to the amount of the settlement income, and not by reference to the analogous calculation to be made for the purpose of the gift that precedes it.

It was so obvious that the word "further," when taken in its ordinary sense, was inconsistent with the contention of the appellant that it was strenuously urged that "further" might be read as synonymous with "larger," but I in vain asked the counsel for the appellant for any instances of such a use. And all the while there is no reason why we should not give to the word the ordinary and natural meaning which it would bear in the sentence in which it stands, as I have indicated when considering the

operative provisions of the will separately. Indeed I have found it so impossible to give any admissible meaning to the word "further" which will make it refer to the previous disposition, that to my mind its presence is another instance of the wholly independent structure of the paragraphs that relate to the two alternative cases.

In this connection an argument of a peculiar character was elaborated at considerable length. It was urged that we ought not to adhere to that which I have called the ordinary and natural meaning of the word "further" in the sentence in which it occurs, because with such an interpretation the meaning of the sentence would not be affected if it were struck out. Stated thus broadly, the principle is, in my opinion, somewhat of a travesty of that canon of construction which is based on what is ordinarily known as "surplusage." There is no presumption that each word used should change the meaning of the sentence. A word may be inserted for the sake of emphasis or for greater clearness, or descriptively, or because it occurs to the writer as suitable to the idea he is expressing, and this without any thought whether it is or is not absolutely necessary to the expression of his meaning. The objection to an interpretation on the ground that it would make a word or phrase surplusage has weight only when the presence of such word or phrase would be unusual or unaccountable if it were not specially inserted for the purpose of altering the meaning of the sentence. The mere fact that you could omit it without change of meaning has in itself no weight. There is no presumption that human beings use the irreducible minimum of words to effect their purpose. Moreover, apart from its inherent weakness, this argument seems specially unhelpful to the appellant in this case, for the word "larger" which he (without any justification so far as I can see) wishes to substitute would be equally surplusage. It would be nothing more than a descriptive epithet not affecting the meaning of the sentence in which it occurs. Nor can it help us to decide whether we ought to read into the latter sentence the limitation which appears in the earlier one, for it is equally applicable whichever view is taken.

A further argument was suggested based on the words "I

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direct that the annual sums of 8000*l.* and 10,000*l.* as the case may be shall be deemed to commence and be payable as from the date of my decease." I am wholly unable to see how a provision as to the date when a payment is to be deemed to commence can bear upon the question out of what fund that payment is to come. We are not concerned with the interpretation of this specific provision, and therefore I do not propose to discuss it, but, whatever its interpretation, its effect on the question before us is nil. It may refer solely to what the trustees are to do initially. If so it means that, whether initially there is surviving issue or not, the date of the commencement of the annual payment is to be the death of the testator. It may perhaps mean that, if at any date by reason of the death of all the surviving issue the second of the two trusts comes into force, the widow is to be placed in the same position as if she had been entitled to 10,000*l.* a year from the testator's death. There would be nothing very remarkable in such a provision, seeing that the reasons for which he had directed that she should hitherto receive 8000*l.* per annum only would then have ceased. The trustees then would have to pay to her such further sums as with the amounts already received by her from the residuary funds would amount to 10,000*l.* for each year since the testator's death. It is quite immaterial to decide which of these views is correct, for, in either case, the question of the amount which they have to pay can have no possible bearing on the question whether they have to pay it out of income or capital.

In my opinion, therefore, upon the ordinary and recognized principles of the interpretation of documents (such, for instance, as would obtain in the case of an instrument to take effect inter vivos), there is nothing in the present case which would justify the Court in giving to the operative provisions of this will another and a different meaning than that which their words would ordinarily bear when taken by themselves. Nor do I think the argument on behalf of the appellant substantially rested on the contrary opinion. The main, if not the sole, object of the criticism of the language of the will was to give some colour to an argument relative to its substance, viz., that as in the one alternative the payment was expressed to be out of income, the

Court must, in the case of a will, presume that the testator must have intended that the payment in the other alternative should also be so. This presumption was treated partly as a presumption of fact and partly as a presumption of law, i.e., as a consequence of the rules of construction of wills laid down by the Courts and binding on us. This is in reality the pith and marrow of the argument for the appellant.

It will be seen that this is an argument based on the substance of the will, and not upon its language. As to its language, there is as a matter of pure construction no room for doubt. The limitation is present in the one case and is absent in the other. It is proposed to read it into the later provision because, inasmuch as the document is a will, it is to be presumed that the testator must have intended it so. I confess that I view all such presumptions with suspicion. Our law gives full liberty of testamentary disposition, and testators avail themselves of this liberty to the full. Courts are therefore venturing on dangerous ground when they leave the actual wording of the document and permit themselves to speculate on what is a probable disposition in a will. It is of course possible that some disposition in a will may be so inconsistent with the rest of the will, or with the surrounding circumstances at the date of the will, that the Court may be led to hold that there is in its expression an error, either in the nature of a clerical mistake, or of the use of a word or expression in an improper and non-natural sense. Where it is a question of choice between two possible interpretations, one of which would have the preference in the absence of indications to the contrary, such considerations may ultimately turn the scale in favour of the other. But where the normal meaning of the words offers no difficulty it is in my opinion not legitimate to allow the probability of a particular disposition to affect the mind of the Court unless perhaps in a case so extreme that the language of the disposition, as it would ordinarily be interpreted, makes it of so extravagant and fantastic a nature that the Court is forced to conclude, as it might be forced to do in the case of any other document, that the true intention of the testator is not represented by the ordinary interpretation of the language he has used.

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There is nothing of this kind in the present case. Taking that interpretation of the gifts in the two alternative contingencies which makes the contrast most striking, we have it that the testator directs that, if and so long as there are children of the marriage living, the wife should receive 8000*l.* a year out of the income of the estate if and so far only as the income for that year is sufficient to pay such sum, and that the remainder at her death is to go to the testator's children; whereas if and when there are no children surviving the wife is to receive out of the estate a definite income of 10,000*l.* a year, and the remainder at her death is to go to the testator's nephew. It might at first sight seem to be somewhat peculiar that the income to be paid to the wife should be larger when she is not burdened with the maintenance of children than when she is so burdened, but a moment's consideration shews that there is a reason for this. In apportioning his estate between that which is to be paid to his wife during her life and the remainder which will be left after her death the testator obviously felt more interest in the remainder being large when it would go to his children than when it would go to a more distant relative, viz., his nephew. In the latter case, therefore, he increases the annual sum to be paid to his wife from 8000*l.* to 10,000*l.*, and I can see no possible reason why in this case he should not have chosen to render the bequest still more valuable by making the sum payable to her a fixed sum and no longer leaving its payment dependent on the revenue which his residuary estate might produce at the moment. Such a change might, and probably would, increase the amount which the wife would receive to the detriment of the expectations of the remainderman, his nephew; but, as it is clear that he intended to make a change of this kind in case he left no issue, I can see no reason why (if the language properly bears that interpretation) we should feel any difficulty in supposing that he intended to improve the gift to his wife in two respects instead of only one—in other words, that he intended not only to increase the amount payable, but also the certainty of the payment being regularly made. And I am the more inclined to regard this as not unlikely because of the fact that, while his income at the date of the will was large enough to

warrant the expectation that it would be sufficient to cover the annual payment directed to be made, that income was largely derived from his interest in the business, and in his will he gave to his trustees extraordinarily wide discretionary powers of employing, or not employing, the residuary trust funds in the business, without giving his wife any power whatever of controlling their decision in that respect. He might well have been content to do this and to leave the income payable to his wife dependent on the actual results of the year, when all that she did not receive was intended to go to his children. But when that was not the case, but the remainder was to pass to his nephew, who was a partner in the firm, he might well have considered that the arrangement made by the trustees in respect of the residuary trust funds should not be allowed to affect his wife's interest in the estate.

I make these remarks with no intention to claim that we should adopt the literal construction of the language of the will, because it is more likely that the testator would desire such a disposition of his property. In my opinion that is not a legitimate ground for our decision. I desire only to point out that there is here no case of a disposition of the property which is extravagant or fantastic or inconsistent with the other dispositions of the will or with the surrounding circumstances at the time the will was made.

But the counsel for the appellant were not content with arguing that it was probable from the nature of the case that the testator would impose the same limitations with respect to the annual sum payable to the wife in the case of no issue surviving as in the case of issue surviving, and that the Court ought to act on such alleged probability. They argued that the Court was bound so to do by a special rule of construction analogous to that which has obtained in certain decisions relating to substituted or additional legacies. I have attempted to formulate the supposed rule as contended for. It is as follows: "If a will provides that in case a certain event happens a specified person shall benefit in a manner which I will call A., and if the said event does not happen he shall benefit in a different way which I will call B., then it is a rule

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of construction that all the conditions and limitations which are expressed to apply to A. must be taken to apply to B., although they are not to be found in the will." Counsel admitted that they could give no authority for this astonishing rule of construction, and it is to my mind impossible to conceive that a Court would give its sanction to so bewildering a proposition. For, inasmuch as A. and B. are independent dispositions possessing the same status, neither being subsidiary to the other, it would follow by parity of reasoning that all the conditions and limitations which are expressed to apply to B. must be taken to apply to A., although they are not to be found in the will. Can it be gravely suggested that the chaos, thus created, is to be accepted by the Court as the due and proper fulfilment of its acknowledged duty in construing a will, viz., the ascertainment of the intention of the testator as expressed by his words. In my opinion, where there are two alternative dispositions of property in a will, according as a specified event does or does not happen, there is no rule of construction or presumption of law which requires, or even permits, the Court to depart from the duty of following the terms in which each of these dispositions is expressed, on grounds based upon what is directed to happen in the other alternative. By hypothesis they relate to different and mutually exclusive contingencies, and must be construed independently each in strict accordance with the language of the will. The Court ought not to speculate on the degree of importance which the testator would be likely to attach to the happening or not happening of the event. This the testator has shewn by the difference in the dispositions he has made in the two cases, and, whatever it is, the Court must accept it. It cannot consider whether the change is too great or too small. It may well be that the happening of the event might, to the testator's mind, wholly change the character of that future for which he is providing. No better example could be given than the case before the Court, where the event is the existence or non-existence of issue. On this event depends whether a testator is providing for his children, and thereby perhaps for his children's children, or whether, as a childless man, his wife is the only member of his immediate family whom

he can benefit. How can the law arrogate to itself the right to presume any specified degree of resemblance, or, indeed, any resemblance at all, between the dispositions which the testator has made in the two cases?

Nor do the decisions, or the dicta, in the cases to which we were referred give any support to so strange and novel a doctrine. They relate to substitutional or additional legacies. With regard to substitutional legacies they amount to the following: Where a pecuniary legacy is given in a will or codicil expressly in lieu of one previously given of a different value, the Courts usually adopt the interpretation that the alteration is intended to apply to the amount of the legacy only, and that therefore the new amount is to be substituted for the amount of the original legacy and becomes subject to the same conditions and limitations. But, although this is the general rule, they do not follow it where its effect would be to introduce such limitations as would convert a gift in its terms absolute into one of a life estate only, and, speaking generally, I do not think that there is any substantial authority for applying the rule to any cases but the simple case to which I have first referred. It is true that in the case of *Leacroft* v. *Maynard* (1), which is usually referred to as the foundation of the rule, Lord Thurlow held that the language of a codicil which revoked certain previous legacies and gave instead legacies, partly of different amounts to the same persons and partly to new beneficiaries, indicated that the new legacies should come out of the same fund as the revoked legacies, i.e., out of a fund arising from real estate. But in that case there was a specific bequest in the will of the whole of the personal estate, and there was nothing whatever in the codicil to indicate any intention to interfere with that bequest, so that, without treating it as strictly a case of the application of the principle, it was a legitimate inference that the new legacies must come out of the fund arising from real estate, that being the only other source from which they could come.

The cases relating to additional legacies, with one exception, appear to me to rest on similar reasoning. If a pecuniary legacy is expressly given in addition to a previous one the Court leans to

(1) 1 Ves. Jun. 279; 3 Bro. C. C. 233.

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the conclusion that the intention of the testator is to alter only the amount of the legacy. The exception to which I refer is *Johnstone* v. *Earl of Harrowby*. (1) In that case Lord Campbell decided that the mere fact that two legacies went to the same person made them additional legacies within the meaning of the rule, whether they were expressed so to be or not. I cannot think that stated thus broadly the rule can be supported, or that it has been followed in subsequent cases. If the testator directs that the legacies in the body of his will shall be free of legacy duty and then at some later date adds a codicil which gives a series of pecuniary legacies simpliciter, without any provision as to the payment of legacy duty, there is in my opinion no presumption that if one of the beneficiaries under the codicil happens to be a beneficiary also under the will his legacy is to be paid free of legacy duty while the others are not. But, however that may be, there is nothing in any of the cases which gives colour to the contention of the appellant. The provisions in question here are independent provisions for mutually exclusive contingencies, and neither the rule nor the reasons for it have any application to such a case.

I am therefore of opinion that the sum of 10,000*l.* a year which the will directs should be paid out of the residuary trust funds to the wife under existing circumstances is not subject to any limitation. But as my brethren take a different view, and hold that we must read into the gift to the widow under existing circumstances the words "out of the income of my residuary trust funds," it becomes necessary to examine what is the meaning and effect of that limitation.

Here we come upon a question of construction which is a legitimate field for a presumption of law. If a word or a phrase is in itself ambiguous, i.e., if it reasonably may bear more than one interpretation, it is open to the Courts, and it is in fact their duty, to decide which interpretation shall be taken as the normal or standard interpretation, so that it is to be preferred when there are no indications to the contrary in the context. The authoritative determination of such a standard meaning is necessary to prevent confusion, and it involves no

(1) 1 D. F. & J. 183.

other presumption as to a testator's intention than that he is to be taken to have used the word in its proper sense, unless he has given in the context adequate indications to the contrary.

As might naturally be expected from its character, the question of the interpretation of the phrase which we have here to construe, or of phrases equivalent to it, has frequently come before the Courts. Nothing is more common in testamentary dispositions than a direction that property shall be held by trustees upon trust to receive the rents and profits and to make annual payments thereout. The characteristic feature of the cases to which I allude and of the case before us is that annual payments are directed to be made out of a fund which receives annual accretions. So long as this feature is present it makes, in my opinion, no difference whether the phrase used to denote the annual accretions is "rents and profits" or "income," and I shall therefore make use of the shorter phrase.

The question is, therefore, what is to be taken as the normal interpretation of a direction to make annual payments out of the income of property so held in trust. There are two, and possibly three, interpretations that might be put on the phrase. The words "out of income" might be construed as designating merely the fund out of which the payments are to be made, or it might be construed as directing that the payments are to be made in each year out of the income of that year only; or perhaps it might be construed as directing that they should be made out of whatever moneys might be in hand at the moment derived from income, whether arising from the income of that year or from accumulations from previous years. I need not express my own view as to which of these three interpretations should be taken as the normal meaning of the phrase, because the Courts in a long series of cases have consistently held (and in my opinion rightly) that in the absence of indications to the contrary the word should be taken as indicating simply the fund from which the payments are to be made, and not as introducing any limitations depending on the state of that fund or the productiveness of its sources at the moment. It will suffice to refer for this purpose to the cases of *Phillips* v. *Gutteridge* (1),

(1) 3 D. J. & S. 332.

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Ex parte Wilkinson (1), and *Booth* v. *Coulton*. (2) The only doubt thrown upon this doctrine is due to a dictum in the judgment of Lord Cairns in *Birch* v. *Sherratt*. (3) In that case there were abundant indications in the context that the meaning to which I have referred must be given to the phrase, so that it was not necessary to decide whether if the phrase had stood alone it would have borne that meaning. Lord Cairns, however, said that as then advised he would not have given that meaning to it in the absence of those further indications, whereas Sir John Rolt L.J. states that he would have done so. Neither decided the point, and it is probable that the naked point was not much argued before them because the additional indications were so strong that it was unnecessary for counsel to deal with the general case.

It follows that, if the phrase designates merely the fund out of which the annual payment is to be made, such payment is a continuing charge upon the fund until it is completely discharged, and this is the form in which the doctrine is usually referred to in the cases. But the form in which I have expressed it appears to me to point more directly to the basis on which the doctrine rests. It is, of course, necessary in applying the rule in this form to take care to ascertain the exact fund upon which the charge rests. This is well illustrated by the case of *Foster* v. *Smith*. (4) In that case an annuity was given by will to be paid out of the income of trust funds. There was a definite and complete gift over of the trust funds on the death of the annuitant, and it was held that the annuity was not a continuing charge on the income of those trust funds. This it could not be, because by the gift over the future income of the trust funds was diverted from the trusts and no longer formed a part of the special fund out of which the annuity was directed to be paid. But the Lord Chancellor, in allowing the appeal, states that the annuity would have been a continuing charge on the income had the gift over been subject to the payment of the annuity, as is the case in the will before us, where the gift over is made expressly subject to the trust to pay the annuity in almost the

(1) 3 De G. & Sm. 633.
(2) L. R. 5 Ch. 684.
(3) L. R. 2 Ch. 644.
(4) 1 Ph. 629.

same words as were held to have that effect in *Booth* v. *Coulton*. (1) Similarly, it is probable that the charge in the last-named case would have been held to apply only to the income during the life of the life tenant, because subsequent income was to go under the will to Philip Booth and would cease to be part of the fund charged. But the decision shews that the annuities were held to be a continuing charge upon whatever fund the annuity was directed to come from.

So clearly have the Courts been of opinion that a sum directed to be payable out of income of a fund is a continuing charge upon that income that they have in many cases gone a step further and said that, by reason of its being a continuing charge upon the income, it is equivalent to a charge upon the corpus, and would be treated by the Courts as such. This does not pretend to be an inference as to the intention of the testator. It is in the nature of a legal consequence of those intentions which will follow whether the testator knew that such would be the case or not. For my own part, while fully admitting that an unlimited charge on the income of a property is in many cases equivalent to a charge upon the corpus, I do not think that it is necessarily so in all cases independently of the nature of the property and the other provisions as to its disposition, and I prefer in the present case to adhere more strictly to the expressed intentions of the testator. I am of opinion that when the testator directed that the payment should be "out of income" he did not intend the capital of his residuary trust fund to be disturbed in order to make the annual payments; and in view of the contemplated employment of the trust funds in the business, and the wide powers given to the trustee in connection therewith, I am not prepared to say that this restriction is an idle one which the law ought on abstract principles to put aside. I hold, therefore, that the direction that the annual payment is to be made out of income in the case of issue surviving makes it a continuing charge on the income of the trust estate, but does not justify its being taken out of the corpus. The same will apply to the annuity of 10,000*l.* in default of issue surviving, in case I am wrong on the first point.

(1) L. R. 5 Ch. 684.

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BUCKLEY L.J. This is a question of construction, and that is almost equivalent to saying that it is a question upon which different minds well may, and probably will, arrive at different conclusions. That has here happened. The question arises upon certain clauses in the testator's will by which he makes provision for his wife. He does so in alternative events—first, the event of his leaving a child surviving him; and, secondly, the event of his leaving no child surviving him or every such child dying in his wife's lifetime. Decisions such as that of Lord Thurlow in *Leacroft* v. *Maynard* (1) have been cited in which a testator having by his will given legacies out of a certain fund, or in certain events, or upon certain conditions, and having by a subsequent codicil given to the same legatees substituted or additional legacies, or even having given to new legatees new legacies, the question was whether the substituted, additional, or new legacies were given out of the same fund, or in the same events, or subject to the same conditions as the legacies given by the will. To my mind those decisions are of little, if any, assistance to us in this case. This is not a case in which the dispositions of one instrument are modified by dispositions in a subsequent instrument. It is a case in which one and the same instrument contains different gifts in different events. The Court of construction must read the instrument and from its language determine the meaning. The gift which this testator makes in the first event is a gift of a certain sum out of the income of his residuary trust funds. It is a gift of a sum out of a fund. The sum is such sum as with the settlement income will make up the total annual sum of 8000*l.* The alternative gift is of such further sum as with the settlement income will make up the total annual sum of 10,000*l.* What does the testator mean by further? Does he or does he not mean that the 10,000*l.*, like the 8000*l.*, shall be paid out of income? I apprehend it to be a true rule of construction that the reader ought to give to every word, if possible, a meaning, and not to say unnecessarily that any word is surplus or redundant. I am far from saying that written instruments do not, in common with the judgments of learned judges and other deliverances, written or verbal, often

(1) 1 Ves. Jun. 279; 3 Bro. C. C. 233.

contain words merely descriptive or words open to the charge of tautology, surplusage, or redundancy. But this fault is not to be attributed unnecessarily. If the word "further" there means only such sum as must be added to the settlement income to make up 10,000*l.*, it is wholly redundant and adds nothing to the meaning of the sentence. The meaning is exactly the same if the word "further" is omitted. On the other hand, I can give the word a meaning, and if so I ought to do so. In my opinion it means such "larger" sum, such enhanced or greater sum, viz., greater by 2000*l.*, than the sum given in the other event. It is quite true that there is no additional sum of 2000*l.*, for the 8000*l.* is in the second event not payable at all. The 10,000*l.* is as to its entirety a new sum. The language, therefore, is not accurate, but it is intelligible. The testator is, I think, by this word, pointing to the fact that in the alternative the sum which he is going to give is a further sum, in the sense that it is a larger sum than he gives in the former event. In this I find an indication that both the smaller sum, and the larger sum are treated by the testator as sums having a common origin, but with this difference, that the one is larger than the other. Abbreviating the sentence, while preserving its form, it is, I think, accurately reproduced as follows: "In one event upon trust to pay to my wife during her life out of income a sum making up 8000*l.*, and in another event upon trust to pay her during her life a larger sum, viz., the sum required to make up 10,000*l.*" In that sentence I think that the latter sum, like the former, is given out of income. Another significant circumstance is that in the next succeeding words he speaks of "the said annual sums of 8000*l.* or 10,000*l.* as the case may be," and directs that they shall alike be payable as from the date of his decease. This was a slip. The language, again, is not accurate. If a child had survived and died in the wife's lifetime the 10,000*l.* would have become payable; but it is difficult to suppose that he meant it to be payable retrospectively as from the date of his decease, enlarging the 8000*l.* which would have to be paid, or payable, down to the death of the child, or, even more extravagantly, in addition to the 8000*l.* during that time. The relevance of the sentence for the present purpose is that in the testator's mind

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the 8000*l.* and 10,000*l.* were so connected as that he groups them in this manner in one sentence. It is difficult, and I confess to me impossible, to suppose that he intended that the one should be payable out of income, but that if the other became payable resort should be had to another source, viz., the corpus of his estate. If he had so intended I cannot doubt that he would have said so. Upon the construction so far, therefore, I arrive at the conclusion that the 10,000*l.* is to be payable out of the same fund as is the 8000*l.*

But the respondent contends that, assuming this to be so, yet both the 8000*l.* and the 10,000*l.* are charged upon corpus, for the subsequent gift is "subject to the trusts aforesaid to pay and divide." She contends that those words have the same effect as if they had been "subject to the payment of such annual sums of 8000*l.* and 10,000*l.* in trust to pay and divide," and not "subject to the trust to pay these sums out of income to pay and divide." This contention in my opinion fails. The gift over is not, as in, for instance, *Ex parte Wilkinson* (1), "subject to the annuity," but is "subject to the trusts aforesaid," that is, subject to the gift, whatever be its effect, for payment of these annual sums, that is (if I am right in what precedes), their payment out of income. The argument of Lord Cairns' judgment in *Birch* v. *Sherratt* (2) elaborates the distinction to which I am referring. If the words of the original gift do not amount to a gift out of corpus, the words of the gift over do not make it such, and do not convert the gift out of the income of a fund into a gift charged upon corpus, whether there be a fund of income or not.

The respondent has pressed us with the case of *Phillips* v. *Gutteridge.*(3) I feel no difficulty about *Phillips* v. *Gutteridge.*(3) There was there a gift of such part of the premises as shall remain undisposed of after the performance of (inter alia) the trusts for payment of the annuity. The necessary result was that the annuity was charged upon corpus, and that is the ground of Lord Westbury's decision. It remains to determine whether the words of the original gift themselves constitute a gift out of corpus or, if that be not so, constitute a continuing gift out of

(1) 3 De G. & Sm. 633. (2) L. R. 2 Ch. 644.
(3) 3 D. J. & S. 332.

income. Upon the first of these questions I find nothing in the words of gift which are other than words of gift out of a fund, and that fund is income. There remains that which, to my mind, is far the most difficult question, viz., whether it is an indefinite gift out of income, or a continuing gift out of income, so that in the former case it might amount to a gift out of corpus, or in the latter case it would follow that, if during the widow's lifetime the whole 10,000*l.* a year should not have been paid, resort might be had after her death to subsequent income to make good the arrears to her estate. If the gift over had been "from and after the decease of my wife in trust to pay and divide," *Foster* v. *Smith* (1) would have been directly in point, and resort could not have been had to subsequent income. That is not the form of gift, but I have, upon the whole language of this will, come to the conclusion that that is its effect. In *Birch* v. *Sherratt* (2) Lord Cairns says: "I do not mean to say there may not be cases in which a direction to pay out of a recurring income, or out of rents, may not indicate an intention to create a perpetual charge"; but he thought that the words in that case, (which are "with and out of the interest dividends and annual proceeds levy and raise" the annual sum of 100*l.*), had not that effect, that they amounted to no more than a direction to pay out of the income if the income was sufficient. Reading the language of this testator, I think that that is what this testator meant.

It is a trust to pay the wife during her life a certain sum so long as any child is living, and a further, that is a larger, sum if there is no child living, and those sums, having regard to what I have said already, are to come out of the income of his residuary trust funds. Subject to those trusts, the residuary trust funds are to be "paid and divided" amongst his children, or in default of children are given to his nephew. He contemplated an immediate division of his residuary trust funds as soon as his wife was dead, and did not contemplate that, after her death, his residuary legatees, who might be his children, should be kept out of their inheritance until the estate of his deceased wife had received arrears, being sums which he intended her to enjoy

(1) 1 Ph. 629. (2) L. R. 2 Ch. 647.

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during her lifetime, if there was income sufficient to provide them. I cannot think that if, for instance, he had left children he intended them to go penniless for years and all income to be paid to his widow's legal personal representative. He meant her to have the annual sum during her life if the income of his estate so allowed; he did not mean to benefit her estate after her death to the postponement of his children's enjoyment. If this be so, the construction is not, of course, varied by the fact that in the events that have happened his nephew, and not his children (for he had none) is the residuary legatee.

Booth v. *Coulton* (1), when rightly understood, is in my opinion not a decision which binds us in any way to hold that there is here a continuing charge on income. In that case there was a devise to trustees upon trusts which continued until the death of one George Booth, and there was no gift over until after the decease of George Booth. During the estate thus vested in the trustees there were declared trusts of the annual profits of the testator's estate, and those trusts were first to pay certain annuities and "subject as aforesaid" to apply the rents for the maintenance and benefit of George Booth during his life. George Booth was still living. Under these circumstances the subsisting trusts binding the trustees were to pay the annuities, and only subject to the payment of the annuities to apply the income for the benefit of George Booth. The Lord Justice held, and the result seems to be unavoidable, that until the trust for the payment of the annuities was performed there was nothing to come to George Booth. That case is wholly different from a case like *Foster* v. *Smith* (2), where at a fixed date a new trust arises, or a new gift takes effect, and the trustees are no longer in receipt of the income. If, as I think, the trust to pay and divide in this case is a new trust or a new gift, *Booth* v. *Coulton* (1) has no application, and *Foster* v. *Smith* (2) is the case which applies.

In my judgment the 10,000*l.* is neither a charge upon corpus nor a continuing charge upon income, but is a sum for whose payment resort may be had to the income of the residuary estate during the widow's lifetime and no further; I think,

(1) L. R. 5 Ch. 684. (2) 1 Ph. 629.

therefore, that the appeal must be allowed, the order below discharged, and declarations made to the effect which I have stated.

Solicitors: *Bartlett & Gregory, for Bartlett & Sons, Sherborne; Peacock & Goddard, for Moody & Woolley, Derby; Morris & Bristow, for Smith & Bostock, Derby.*

J. R. B.

In re EARL OF DARNLEY. CLIFTON *v.* DARNLEY.

[1902 D. 147.]

Tenant for Life and Remainderman—Will—Real Estate—Trust for Conversion—Mining Lease—Payments in Nature of Royalties—Capital or Income.

By his will a testator gave his residuary real and personal estate to a trustee upon trust for conversion, and to invest and pay the proceeds to his wife for life, and after her death to his children. There was no power given by the will to postpone conversion, nor any express gift of the income before conversion. Part of the testator's real estate consisted of land comprised in a mining lease which empowered the lessee to dig chalk on certain portions of the land demised, and to take additional chalk land, provided that he paid, by way of consideration for the purchase of the same, at the rate of 900*l.* per acre. The estate was being administered by the Court, new trustees had been appointed, and a sale of the real estate directed, but no sale had yet taken place:—

Held, that the moneys received and to be received by the trustees of the will from the lessee in respect of the purchase of the additional chalk land must be treated by them as income and not capital.

In re Searle, [1900] 2 Ch. 829, followed.

By a lease dated June 24, 1897, made between the Right Honourable Edward Henry Stuart, Earl of Darnley, of the one part, and William Fletcher, of Bycliffes, Gravesend, in the county of Kent, of the other part, the Earl of Darnley (as "lessor") demised unto William Fletcher (as "lessee") certain premises firstly, secondly, and thirdly therein described, and then demised fourthly "all the subsoil, beds, or strata of chalk, flints, rubbish, and material for the making and burning of lime, lying and being in and under all the lands and hereditaments situate in the parish of Gravesend," particularized and shewn on the

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plan drawn in the margin, and therein coloured yellow and pink and the small portion of land coloured green, therein referred to as being unexcavated, with full liberty for the lessee to enter upon the said lands, subject to the restrictions thereinafter contained, and dig chalk, flint, rubbish, and materials for the making and burning of lime, for the term of twenty-one years from September 29, 1895 (determinable as therein mentioned), yielding and paying in respect of the premises firstly, secondly, and thirdly therein described the yearly rent of 313*l.*, and in respect of the premises fourthly described the yearly rent of a peppercorn, if demanded, but subject to the covenants thereinafter contained. And by clause 12 of the lease the lessor covenanted with the lessee that in case and when and as often as the lessee should, during the continuance of the demise, require to have additional chalk land out of the premises coloured yellow, pink, and green for the purpose of digging chalk, flints, and rubbish thereon, with liberty to sell and dispose of the same as thereinbefore authorized, and of such his desire should give or leave notice in writing to or for the lessor or his steward or agent, then and in that case the lessor, his steward or agent, would within one calendar month from the delivery of such notice, "and on receiving from the lessee as or by way of consideration for the purchase of the chalk and other minerals thereupon the sum of 900*l.* for every acre, and so in proportion for a less quantity than an acre of such additional chalk land," from time to time allot, measure and mark out for the purposes aforesaid such further piece or pieces of chalk land as the lessee should by such notice from time to time require, not being less at any one time than half an acre, until the whole of the same should be dug out and the chalk and other materials exhausted.

By his will dated January 26, 1899, the Earl of Darnley, after making certain specific bequests to his wife and giving a legacy to his executor and trustee, William Doveton Smyth, devised and bequeathed all his real and personal estate not thereby otherwise disposed of to his said executor and trustee, upon trust that he should sell, call in, and collect the same, and should, out of the moneys arising thereby, and all other moneys forming part of his estate, pay his funeral and testamentary expenses and debts,

and in the event of his dying leaving issue, should invest the residue of the said moneys in any of the investments for the time being authorized by law for the investment of trust moneys, with power to vary such investments at discretion, and should pay the income of the said residuary moneys and investments to his wife, the defendant Jemima Adeline Beatrice, Countess of Darnley (now the wife of Arthur Cavenagh Leveson), during her life, and after her death should hold the same and the income thereof in trust for all his children, or any his child who being sons should attain the age of twenty-one, or being daughters or a daughter should attain that age or marry, and if more than one in equal shares, and if there should be no child, issue of his said marriage, living at his death, then he bequeathed the residue of such trust moneys to his wife.

The said Earl died on October 31, 1900, and his will was proved on March 5, 1901, by William Doveton Smyth, since deceased.

The Earl left the Countess him surviving and one child, the plaintiff Elizabeth Adeline Mary, Baroness Clifton (an infant suing by Sir Reginald John Cust, her next friend). The testator's estate was being administered by the Court, and the defendants Stevenson Arthur Blackwood and Lionel Cust were appointed receivers of the estate under an order of January 31, 1902. By an order of May 13, 1902, they were appointed new trustees of the testator's will, and a sale of the real estate was directed with the approval of the judge. No sale had yet taken place. Since the commencement of the action the trustees of the will received sums amounting to 1278*l.* 15*s.* for the purchase of chalk land by the lessee pursuant to the provision in the lease.

On June 27, 1906, they took out a summons for directions as to whether the purchase-moneys received and to be received by them from William Fletcher for chalk land under the lease of June 24, 1897, should be treated as capital or income.

C. Gurdon, for the trustees of the will.

P. O. Lawrence, K.C., and *G. W. Brabant*, for the tenant for life. The tenant for life claims the whole of the proceeds derived from these sales as income. If a testator grants leases

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for mining purposes over certain portions of his estate, and gives the income to one, with remainder to another, the tenant for life takes the whole of the rents and royalties. The case of *In re Searle* (1) applies, although there was in that case a power to postpone the conversion. In the case of real estate, where there is a power to postpone conversion and such power is properly exercised, and also where there is no power to postpone and there has been no impropriety in postponing the sale, then the tenant for life is entitled to the income of the property until sale. In the present case there is no power to postpone, but there has been no impropriety in not selling, since it is the action of the Court itself. The payments here made under the terms of the lease are in the nature of royalties, and upon the true construction of the lease must be deemed rents and profits, and thus payable to the tenant for life.

The question turns upon clause 12 of the lease. The 900*l.* mentioned as the price per acre is in the nature of a royalty paid for the chalk. It is immaterial that it is paid in one lump sum; it is profit resulting from real estate. There has been no notional conversion, as this is a case of real property. In a case in the Privy Council which may be thought to go against this view, namely, *Wentworth* v. *Wentworth* (2), it was taken for granted that a conversion had taken place at the end of the twenty-one years, and that the cases of *Brown* v. *Gellatly* (3) and *Meyer* v. *Simonsen* (4) applied. In the case of *In re Woods* (5) it was agreed that a notional conversion had taken place. There was both real and personal estate in that case, and the trustees had a trust for sale with a discretionary power to postpone. But the only point argued was as to the rate of interest to be paid to the tenant for life. *Brown* v. *Gellatly* (3) was a case of personal estate, and it is submitted that there can be no notional conversion of real estate. In both these cases of *Wentworth* v. *Wentworth* (2) and *In re Woods* (5) the question to be decided here was really never raised. In the case of *Miller* v. *Miller* (6) the tenant for life was held entitled to royalties absolutely. In the case of

(1) [1900] 2 Ch. 829.
(2) [1900] A. C. 163.
(3) (1867) L. R. 2 Ch. 751.
(4) (1852) 5 De G. & Sm. 723.
(5) [1904] 2 Ch. 4.
(6) (1872) L. R. 13 Eq. 263.

Thursby v. *Thursby* (1), which was a case of leasehold collieries, there were sufficient indications in the will to exclude the operation of the rule in *Howe* v. *Earl of Dartmouth* (2), and the tenants for life were held entitled to the produce of the collieries. Payments for mineral ore profits are royalties in the nature of rent: *Daly* v. *Beckett* (3); *Campbell* v. *Wardlaw*. (4) In this last case Lord Watson says (5) that if the owner of the soil "creates a mineral estate by working or letting a particular seam of minerals he thereby brings the proceeds of the minerals so worked or let within the category of fruits, and within the right of usufruct."

MacSwinney, for the remainderman. These payments in the nature of mineral royalties are capital, and not income. There is no peculiarity in the word "profits." The intention of the testator is the key for the proper determination of the question, and his intention was that the corpus of the estate should remain undiminished. In *Hope* v. *d'Hédouville* (6) the corpus remained undiminished, but in the present case the corpus would be eaten up year by year if the tenant for life has the right to receive the proceeds of these periodical sales. The position of the remainderman here is stronger than in those cases where a notional conversion was admitted or held to exist, and it is not really necessary to rely upon the doctrine of a notional conversion, because there is an express trust to convert, without any power to postpone, and there is no direction as to the rents and profits before conversion. The fact that the trustees and the Court have not yet sold the real estate is no reason for altering the rights of the tenant for life and remainderman. Under the will there is a clear intention expressed that an immediate sale should take place, and the tenant for life is not entitled to this sum as income. The case of *Campbell* v. *Wardlaw* (4) is really in favour of this contention, and the principle there laid down was followed in *Dashwood* v. *Magniac*. (7) The cases of *Wentworth* v. *Wentworth* (8) and *In re Woods* (9) are also in point. It

(1) (1875) L. R. 19 Eq. 395.
(2) (1802) 7 Ves. 137a.
(3) (1857) 24 Beav. 114.
(4) (1883) 8 App. Cas. 641.
(5) 8 App. Cas. 650.
(6) [1893] 2 Ch. 361.
(7) [1891] 3 Ch. 306, 327.
(8) [1900] A. C. 163.
(9) [1904] 2 Ch. 4.

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would be inconsistent, therefore, with the intention expressed by the testator if the tenant for life were to receive the profits of this property before conversion.

P. O. Lawrence, K.C., in reply.

Cur. adv. vult.

Nov. 22. KEKEWICH J., after reading the material parts of the will of the Earl of Darnley, continued:—There is no power, express or implied, to postpone the conversion directed by the will, nor is there any power to make leases. Except as regards the words "other moneys forming part of my estate"—whatever that may mean—there is no express gift to the wife during her life of anything but the income of the investments consequent on conversion.

Part of the testator's real estate consisted of land comprised in a lease dated June 24, 1897, which empowered the lessee to dig chalk and other materials under portions thereof, and provided that the lessee should pay by way of consideration for the purchase of such chalk and other materials, an acreage rent there specified. The question is whether the widow, as tenant for life under the will, is entitled to receive this acreage rent, and, if not, what other sum is payable to her in respect of this property.

There has been no conversion of the land comprised in the lease, but it cannot be said that there has been any improper delay in effecting such conversion, for the testator's estate is being administered by the Court, and the judgment in the administration action, dated May 13, 1902, directs that the testator's real estate be sold with the approbation of the judge, which, of course, could be at any time applied for by the remainderman, who is the only child of the testator and is the plaintiff in the action. On her behalf it is contended that the testator's intention was that the corpus of his estate should remain undiminished, and that if necessary there must be a notional conversion, under which the widow would only be entitled to interest on the value of the land ascertained at the date of the death of the testator.

Reference was made to many authorities, of which *Brown* v.

Gellatly (1) may be taken as typical. On the other hand, it was insisted that there was a distinction between real and personal estate, and I was asked to follow my own conclusion, arrived at after full argument, in *In re Searle* (2), that where there is a trust for sale, with a power to postpone which has been exercised, or where sale without any impropriety has been postponed, the rents and profits of the real estate, until sale, are payable to the person who would be entitled to the income of the proceeds of sale. I thought it right to take an opportunity of looking into the other authorities quoted, and to consider whether they disclosed any reason for departing from this conclusion. In my judgment they do not. Under these circumstances, I do not propose to discuss the other authorities.

I will answer the question asked by the summons by declaring that the purchase-moneys received and to be received by the applicants, the trustees of the will, from William Fletcher, the lessee, for chalk land in the lease of June 24, 1897, should be treated by them as income and not capital. The costs must come out of the residuary estate.

Solicitors : *Capron & Co., for all parties.*

(1) L. R. 2 Ch. 751. (2) [1900] 2 Ch. 829.

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In re WARING.
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[1905 W. 3847.]

Will—Legacy to Charitable Institution—School for Education of Poorer Classes—Trust Deed—Denominational Teaching—Discontinuance of Week-day School after Will, but before Death of Testatrix—Continued user as Sunday School—No Lapse.

Testatrix bequeathed a legacy to "St. Andrew's School, Heybridge," for the benefit thereof. A school of that name was founded by a brother of the testatrix in 1869 for the education of children of the poorer classes, the religious part of the education to be according to the principles of the Church of England. From the date of its foundation this school had been used for the purposes of a Church of England elementary day school on week-days, and of a Sunday school in connection with Heybridge parish church on Sundays, and was so used at the date of the will. For some years previous to the testatrix's death, however, this week-day school had been discontinued, having lost the Government grant, and the school-house had not been used for any other day school under the trusts of the deed of settlement, but it continued to be used for the Sunday school uninterruptedly down to the present time:—

Held, that the legacy had not lapsed, for although the purposes for which the school was founded had to a great extent failed, yet there had not been, so to speak, a "total loss" of the institution, inasmuch as it still survived in the Sunday school and performed its objects on one day in the week.

Adjourned Summons.

By her will dated January 20, 1897, the testatrix, Abra Maria Waring, appointed the plaintiff her executrix, and after bequeathing amongst other charitable legacies the following, namely, "to St. Andrew's School Heybridge Essex 400*l*.," and directing the same legacies to be paid to the treasurer or treasurers of those charitable institutions for the benefit thereof, gave her residuary estate to the plaintiff upon trust, after payment of legacies, for her statutory next of kin.

The testatrix died on February 28, 1905, and her will was duly proved by the plaintiff.

The material facts relating to St. Andrew's School, Heybridge, mentioned in the will were as follows: By a deed poll dated November 11, 1869, Walter Waring, a brother of the testatrix, "freely and voluntarily and without valuable consideration and more especially for promoting the welfare of the inhabitants of the parish of Heybridge of which my father the Reverend Francis John Waring was for many years the vicar," granted the piece of land in the said parish therein described, and also the school-house called "St. Andrew's School," which had been erected thereon by and at the grantor's sole expense unto Thomas Wren, the then vicar of the parish, and his successors and assigns for ever, upon trust to permit the said piece of land and school-house and all future buildings to be erected thereon to be appropriated and used as and for a school for the education of children and adults or children only of the labouring, manufacturing and other poorer classes resident in the said parish or resident in any other adjoining or adjacent parish or parishes, but as to residents in such adjoining or adjacent parish or parishes not without the consent of the vicar of Heybridge for the time being and his churchwarden, and that, so far as regarded the religious part of such education, the same should be according to the principles of the Church of England. The deed also provided that the management and government of the school and premises, and of the funds and endowments thereof, and of the selection, appointment, and dismissal of the schoolmaster and schoolmistress or either of them and their assistants, should be vested in and exercised by the vicar of Heybridge for the time being and his churchwarden, and that every master and mistress in the school should be a member of the Church of England.

On the front of the school-house, in carved stone, was the inscription, "St. Andrew's In Memoriam School."

It appeared that from the date of the deed poll an elementary day school, known as St. Andrew's School, was carried on as a Church of England school in the school-house in question down to the month of September, 1900, when the day school was closed on account of the refusal of the Board of Education to recognize the school owing to the insufficiency of accommodation and lack of sanitary arrangements in the school buildings.

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Throughout the same period, and subsequently down to the present time, the school-house was used continuously on Sundays as a Sunday school in connection with Heybridge Church for regular instruction in accordance with the principles of the Church of England.

The testatrix gave an annual subscription of 5*l.* towards St. Andrew's School until it ceased to be used as a day school in September, 1900, after which time she subscribed 1*l.* annually to the Sunday school at Christmas time.

In April, 1901, the managers of the Heybridge Ironworks School, an undenominational school and a recognized elementary day school, obtained the use of St. Andrew's school-house for the purpose of the infants department of the Ironworks School, for which purpose the school-house was still used. The mistress was a member of the Church of England, the religious teaching was in accordance with the doctrines of the Church of England, and the school was still carried on in accordance in all respects with the provisions of the trust deed. The defendants, the vicar of Heybridge and his churchwarden, were two of the four managers of the Heybridge Ironworks School, and were also the trustees of St. Andrew's School, and had not parted with the possession or control of it.

The plaintiff took out this summons against the Attorney-General, the vicar and his churchwarden, and one of the residuary legatees for the determination of the question whether the legacy had lapsed by reason of the closing of St. Andrew's School before the death of the testatrix, and, if not, who was entitled to it.

Peterson, K.C., for the plaintiff.

Ingpen, K.C., and *Hon. Frank Russell*, for the defendant vicar and churchwarden. The legacy has not lapsed. At the time of the testatrix's death St. Andrew's School was, and it still is, in existence. The original day school was discontinued in 1900 owing to the withdrawal of the Government grant consequent upon the refusal of the education authority to recognize it any longer as an elementary school under the Elementary Education Acts, but nevertheless the school-house has been used continuously throughout for the purposes of a Sunday school complying

in every respect with the requirements of the trust deed. There can be no doubt that this was a good charity, and the only question now is whether it still exists. *In re Rymer* (1), where all the authorities are examined, shews that the object of the gift must have failed altogether in the testator's lifetime, but in the present case there are still a trust deed and a school which, however feeble its existence, does nevertheless still exist. The mere fact of non-recognition by the education authority has not determined the charity. The Sunday school part of the institution has always been carried on, and although there was a gap of nine months in the week-day education, that has been resumed. This is a gift to an institution which in fact has never ceased to exist.

George Lawrence, for the Attorney-General. I adopt the same argument upon the question of lapse. If, however, the Court should be of opinion that the institution ceased to exist in the lifetime of the testatrix, then, having regard to the objects of the gift as appearing in the trust deed, I submit that there is an overriding charitable intent, and the legacy ought to be applied cy-près: *In re Buck.* (2)

[KEKEWICH J. I think that would be going further than any reasonable construction of the words would warrant. The only question is whether there has been what I may call a "total loss."]

P. O. Lawrence, K.C., and *Ribton*, for the defendant residuary legatee. The question of lapse depends upon whether there has been a total cesser of the school or not. That involves two considerations, namely, the meaning of the phrase "St. Andrew's School," and the events which have happened. "St. Andrew's School" does not mean merely a school building, but it means a living establishment carried on for all the purposes of the trust deed. On the evidence, we submit that this school has ceased to be carried on as a living establishment in fulfilment of the terms of the trust deed. True, a Sunday school is carried on in the school-house on Sundays, but we submit that that is not enough. The establishment for the education of children as described in the trust deed and as named in the will ceased to

(1) [1895] 1 Ch. 19. (2) [1896] 2 Ch. 727.

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exist in the lifetime of the testatrix, and, that being so, the legacy has lapsed.

KEKEWICH J. Counsel's argument on behalf of the residuary legatee cannot be supported except on the footing that the education contemplated by the trust deed is to be confined to six days in the week. If the education extends to the seventh, or, strictly speaking, the first, day of the week, then it seems to me that his argument must necessarily fail. St. Andrew's School, whether you call it a building or institution, has ceased to perform its objects as stated in the deed of settlement on all the days of the week except Sunday. The school-house is still used on week-days for the purposes of a school, namely, as a school for the infants branch of the Heybridge Ironworks School, and I gather from one of the affidavits that, the school-house being in private hands, the Church of England's doctrines are taught there, and, so far, there is a user of the building according to the intention of the deed. But it is not used by the trustee, and those who use it are not in any sense his agents; they are simply his licensees, and, strictly speaking, he has committed a breach of trust in allowing it to be used in that way. Nobody, however, has found fault with him for not holding the school for the purposes of the deed. It is, to my mind, immaterial that Church of England doctrines are taught there. The persons who use the school on six, or according to modern habits only five, days a week are mere strangers to the deed, and are only licensees. To that extent it seems to me that the school has failed, but it has been continuously used on the seventh day, Sunday, and used as a Sunday school for religious instruction in accordance with the principles of the Church of England. The conduct of the Sunday school must be under the superintendence of the vicar. He may or may not take an active part, but I cannot credit him with not having sufficient control to see that the trusts of the deed are properly observed. I must assume that he looks after it sufficiently for that purpose. The school, therefore, has not wholly ceased to exist. For the purposes for which it was constituted it has to a great extent failed, but, to repeat my phrase, there is no total loss. That being so, there is no

difficulty in upholding a gift to St. Andrew's School as a gift to something which is still existing—in a poor way it may be, but it is still alive, not dead, even if it be moribund. I must, therefore, uphold the gift. The gift then being good, I must see that the 400*l.*, and the school buildings and land, are properly applied. Upon the Attorney-General taking out another summons, to be served only on the vicar, I will make an order on this summons directing the legacy to be paid into Court to the credit of that action, and then all proceedings in this action will be stayed, and I will make an order upon the other summons directing a scheme.

Solicitors: *Bridgman, Willcocks, Cowland, Hill & Bowman, for Crick & Freeman, Maldon; G. E. Rigden, for Beaumont & Bright, Maldon; The Treasury Solicitor; A. G. Maskell.*

R. M.

In re GLUKMAN. ATTORNEY-GENERAL *v.* JEFFERYS.

[1906 G. 949.]

Executors—No next of kin—Beneficial Title to Residue—Equal Pecuniary Legacies to all the Executors—Unequal Specific Legacies to none.

In a case where there are no next of kin the executors are beneficially entitled to undisposed-of residue unless the will shews a contrary intention. It is settled law that such an intention will be inferred from the gift of a pecuniary legacy to a sole executor or of equal pecuniary legacies to all the executors. This inference will not be rebutted by the gift of specific legacies of unequal value to two out of three executors to all of whom equal pecuniary legacies are given.

LEONE GLUKMAN by his will dated September 15, 1881, appointed George Jefferys, Manuel Cardenosa, and Clair James Grece to be his executors, and after giving a number of pecuniary legacies, including 1000*l.* each to Clair James Grece and Manuel Cardenosa, proceeded, "All my foreign decorations I bequeath to Manuel Cardenosa my diamond ring (a present to me from the Emperor of Russia) to the said Clair James Grece and also my keyless repeater gold watch." He then gave a number of other

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legacies, including a legacy of 1000*l.* to J. Burton in trust for his children, a legacy of 1000*l.* to George Jefferys, and directed all the above legacies to be paid as soon as conveniently could be after his decease. The will did not contain any gift of residue.

The testator died on November 16, 1881. His will was proved by all three executors on February 1, 1882. In 1885 proceedings were taken for the administration of the testator's estate, and an inquiry was ordered who were the testator's next of kin and whether he left a widow. Under this inquiry 166 persons claimed as next of kin, but all their claims were disallowed. On July 14, 1905, the chief clerk certified that the testator left no widow, and that no sufficient evidence had been adduced to shew whether there were any next of kin living at his death. A summons by the plaintiffs to vary this certificate had been dismissed.

Manuel Cardenosa, one of the executors, died on May 22, 1893.

By an agreement dated May 13, 1897, G. Jefferys and C. J. Grece severed the joint tenancy between them, if any, in the testator's residuary estate.

C. J. Grece died on December 8, 1905.

In May, 1906, this summons was taken out by the Attorney-General asking for a declaration that on the true construction of the testator's will, and in the events which had happened, the surviving executor, G. Jefferys, was a trustee for the Crown of the testator's residuary estate, and for an inquiry of what the residuary estate consisted at the testator's death and of what the same now consisted. The surviving executor, Jefferys, and the legal personal representatives of C. J. Grece were made defendants.

George Lawrence, for the Crown. The Act of 1830 (11 Geo. 4 & 1 Will. 4, c. 40), which makes the executors trustees for the next of kin, does not apply where there are no next of kin. This case must therefore be decided according to the old law. The old rule was that the executors were prima facie entitled to undisposed-of residue beneficially as well as at law, unless there was evidence of a contrary intention on the face of the will, or (as is less clear) by parol evidence, but that question does not arise, for there is no parol evidence here. It will not be disputed that if any pecuniary legacy was given to a sole executor, or

equal pecuniary legacies to all the executors, they could not take the residue. But if pecuniary legacies were given to some only of the executors, or unequal legacies were given to all, the presumption that they were entitled to the residue was not rebutted. The question in this case is whether the inference from the executors taking equal pecuniary legacies is defeated by the gift to two out of the three of unequal specific legacies. There is no direct authority, but the principle on which the cases rest is that it may reasonably be inferred from the testator giving a part that he did not mean to give the whole. That principle would appear not to apply to specific legacies, because they are not given in the same way as the residue, but deliberately separated from it. *Foster* v. *Munt* (1), *Petit* v. *Smith* (2), *Farrington* v. *Knightly* (3), *Southcot* v. *Watson* (4), *Nourse* v. *Finch* (5)—on appeal sub nom. *Hornsby* v. *Finch* (6)—*Clennell* v. *Lewthwaite* (7), *Dicks* v. *Lambert* (8), and *Saltmarsh* v. *Barrett* (9) are all cases where a legacy to one executor or equal legacies to more than one prevented their taking the residue, and they all depend on what Sir Richard Arden M.R. in *Clennell* v. *Lewthwaite* (7) called the violent presumption afforded by the gift of a part that the testator did not mean the executors to take the whole. The same rule is laid down in Cox's note to *Farrington* v. *Knightly* (3), and he states that a specific legacy to a single executor excludes him, but specific legacies of unequal values to several executors do not exclude them.

The cases in which unequal legacies, or legacies to some of executors only, have been held not to deprive the executors of the residue really establish the same rule. In *Bowker* v. *Hunter* (10) Lord Loughborough states the rule in these cases to be that "where the legacy is consistent with the intent of the executor's taking the whole, it shall not exclude him from it." *Griffiths* v. *Hamilton* (11), *Pratt* v. *Sladden* (12), and *Russell* v. *Clowes* (13) rest

(1) (1687) 1 Vern. 473.
(2) (1695) 1 P. Wms. 6.
(3) (1719) 1 P. Wms. 543.
(4) (1745) 3 Atk. 226.
(5) (1791) 1 Ves. Jun. 344.
(6) (1793) 2 Ves. Jun. 78.
(7) (1794) 2 Ves. Jun. 465.
(8) (1799) 4 Ves. 725.
(9) (1861) 3 D. F. & J. 279.
(10) (1783) 1 Bro. C. C. 328, 332.
(11) (1806) 12 Ves. 298.
(12) (1807) 14 Ves. 193.
(13) (1846) 2 Coll. 648.

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on the same principle. In *Muckleston* v. *Brown* (1) equal legacies were given to two executors out of personal estate, but some real estate was given to one and none to the other. Lord Eldon held that they did not take the residue, because the inequality in the real estate did not alter the inference from equal legacies. In principle that case governs the present one. In *Ommanney* v. *Butcher* (2) the executors were given equal legacies and unequal interests in certain stocks, and the Master of the Rolls (Sir T. Plumer) held that the executors did not take the residue, but he rested his judgment rather on the ground that the legacies were given for their trouble. On principle there is no reason why the gift of unequal specific legacies should affect the rule. Where the specific legacies have been severed from the residue, there is still no reason for giving the executors part if they are to take the whole.

Cassel, *K.C.*, and *Coldridge*, for the surviving executor. Looking at the whole will, the only gift which is not absolute is the 1000*l.* to Burton in trust for his children, and there the trust is plainly declared. If the testator had intended his executors to be trustees it would have been easy to say so. We rely on *Bowker* v. *Hunter* (3) as establishing the rule that wher ever the executors take unequal legacies, of whatever kind, the inference that they are not to take the residue is rebutted. *Oliver* v. *Frewen* (4) is to the same effect. Most of the cases cited turned upon special circumstances, and in nearly all the legacies were given to the executors "as executors" or "for their care," or with similar words which would of themselves imply that the executors were not to take the residue beneficially. In *Petit* v. *Smith* (5) the words of the will are not given, but the head-note says they had "express" legacies, which probably means legacies as executors. There is no case where there was more than one executor and all the words of the will are given, in which legacies given without some words signifying they were to take "as executors" have been held to

(1) (1801) 6 Ves. 52.
(2) (1823) T. & R. 260.
(3) 1 Bro. C. C. 328.
(4) (1785) 1 Bro. C. C. 590.
(5) 1 P. Wms. 6.

deprive them of the residue. *Southcot* v. *Watson* (1) is a clear authority that specific legacies stand on exactly the same footing as pecuniary legacies.

Peterson, K.C., and *Daniel Jones*, for the legal personal representatives of Grece. In *King* v. *Denison* (2) Lord Eldon expressed a decided disapproval of the doctrine that a legacy given to an executor deprives him of the residue, and said it should not be extended; and in *Attorney-General* v. *Hooker* (3) Lord Chancellor King seems to have been of the same opinion, and he there treats a specific legacy as on the same footing as a pecuniary one. The real test is whether the executors take an equal, or an unequal, benefit out of the residue as a whole. It is impossible to draw any distinction between specific and pecuniary legacies, for specific legacies would include cash in the house or in the bank where the benefit is simply pecuniary. The plaintiff is seeking to extend a rule which all the judges have striven to limit.

George Lawrence, in reply.

Cur. adv. vult.

Dec. 18. SWINFEN EADY J. The question raised by this summons is whether the clear residue of the testator's estate now belongs in equal moieties to Mr. Jefferys and the estate of the late Mr. C. J. Grece, or whether, in the events which have happened, the defendant Jefferys is a trustee of it for the Crown. [His Lordship stated the will and the facts of the case as above, and continued:—]

The present case is not affected by the statute 11 Geo. 4 & 1 Will. 4, c. 40; there are not any next of kin, and the title of the executors as against the Crown is governed by the old law, and the burden is on the Crown to establish that the executors do not take beneficially.

It is clear law that if only one executor be appointed, and a pecuniary legacy be given to him, he will not take the residue beneficially, the reason being—as stated by Sir R. P. Arden M.R. in *Dicks* v. *Lambert* (4)—that "a gift of part to an executor bars

(1) 3 Atk. 226.
(2) (1813) 1 V. & B 260, 277.
(3) (1725) 2 P. Wms. 338.
(4) 4 Ves. 731.

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him from the whole." The same rule applies if several executors be appointed, and pecuniary legacies of equal amount be given to each. The principle is that where executors are intended to take the whole residue beneficially, no reason exists for giving a part to them equally.

On the other hand, it is not sufficient to rebut the presumption that the executors are intended to take the residue beneficially, if when several executors are appointed pecuniary legacies of unequal amounts are given to them.

The circumstance in the present case, which raises a question of law for decision, is that different specific bequests are made to two of the three executors, as well as pecuniary legacies of 1000*l.* to each of the three executors. Does the fact that these specific bequests are made to two executors prevent the application of the rule, which would follow from giving equal pecuniary legacies? It is difficult upon principle to see why it should make any difference.

It is necessary to bequeath specific articles to each of two executors if it is intended that such two executors shall take those articles beneficially. If, however, it is intended that the executors shall also take the whole residue beneficially, it is needless to give them equal pecuniary legacies; and this applies with equal force whether the executors do or do not take specific legacies. There is no more reason in the one case than in the other to give them pecuniary legacies of equal amount when they are intended to take the residue equally and beneficially.

In *Nourse* v. *Finch* (1) the Solicitor-General (Sir John Scott, afterwards Lord Eldon) in arguing the case for the defendant, the executrix, said that he did not dispute the principle that where an executor has a legacy, an inference is raised to exclude him from the surplus, upon the idea that he to whom part is given was not intended to have the whole. And in giving judgment Buller J. said: "It is material to see what line this Court has laid down between the cases where the executor shall be excluded and where not: and so long ago as the year 1709 the rule in equity was laid down, that if part is given to the

(1) 1 Ves. Jun. 344, 350, 356. The case referred to by Buller J. seems to be unreported.

executor, the surplus shall go to the next of kin. In another case also, in 1734, *Mackworth* v. *Welling*, the rule was laid down thus: 'Where a legacy is particularly given, and to come out of the residue, it is an exclusion from the residue.'" In that case of *Nourse* v. *Finch* (1) there was a bequest to Miss Finch of 1100*l.* secured to the testator by the Commissioners of the Oxford Market with the arrears, to dispose of as she should think fit, and she was appointed executrix, and it was held that she was thereby excluded from taking the residue beneficially, and was a trustee for the next of kin. On appeal this decision was affirmed by Lord Loughborough (2), who held that, the legal interest being in the executor, exceptions to raise a trust for the next of kin have been admitted, and one of those is the inference arising from the circumstance of a legacy being given to the executor, that he to whom part is given is not intended to take the whole. In *Dicks* v. *Lambert* (3) the Master of the Rolls said that it was then (1799) so perfectly settled that it was unnecessary to repeat the rule that making an executor does vest in him the personal estate of the testator, unless a reasonable ground appears upon the will that the testator did not intend by making that executor to vest in him the residue; and that it was long ago decided that a legacy of any part of the personal estate, unless there are special circumstances, affords a presumption sufficient to bar that general right as executor. *Saltmarsh* v. *Barrett* (4) was a case of equal pecuniary legacies to three executors, and they were excluded from taking the residue beneficially. Turner L.J. said: "There are here equal legacies to these three persons who are appointed to be the executors, and these legacies must be payable out of the estate which is said to be given to these three persons beneficially, so that the testator, according to the appellant's contention, was at the same time giving to these three persons part and the whole of the same estate. It was said that these legacies may well have been given for the purpose of putting the executors to that extent upon the same footing as the other legatees; but that argument has been urged in many cases in

(1) 1 Ves. Jun. 344.
(2) 2 Ves. Jun. 78.
(3) 4 Ves. 729.
(4) 3 D. F. & J. 279, 286.

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which the question has been whether executors to whom there was no express gift were trustees of the residue for the next of kin, and it has not succeeded."

On the other hand, the cases of *Bowker* v. *Hunter* (1), *Griffiths* v. *Hamilton* (2), *Pratt* v. *Sladden* (3), and *Russell* v. *Clowes* (4) are cases where unequal pecuniary legacies were given to executors, or where legacies were given to some only of the executors, and it was held that the executors were not thereby precluded from taking beneficially.

It was urged on behalf of the defendants, that in considering whether executors take under the will equal or unequal amounts there is no difference between specific and pecuniary legacies, that, on that footing, the executors in the present case take unequally, and are accordingly entitled to the residue beneficially, and the case of *Southcot* v. *Watson* (5) was relied upon in support of the proposition that, for the purpose of the rule now under consideration, there is no difference between specific and pecuniary legacies. In that case, there was a gift of household goods, furniture, plate, linen, watches, jewels, and clothes to Mrs. Ann Watson, and she was appointed sole executrix. Lord Hardwicke held that she was thereby excluded from taking the residue beneficially. He said: "This is a bequest of specific things, though under a general description. But yet I am of opinion that the executrix is excluded of the residue. Several objections have been made: First, that though a pecuniary legacy will exclude executors, yet a specific one will not; and several cases have been cited for this purpose; and it has been said, that the testator might intend that in case there should be a deficiency of the surplus, she should be secure of the specific legacies. This reasoning would prove too much, it would hold almost as strongly in the case of a pecuniary legacy, for it might be said the testator intended his executor should take something at all events, and not depend merely upon the sufficiency of the surplus." He then dealt with the precedents cited for the executrix, and held that they failed entirely. And in *Bowker*

(1) 1 Bro. C. C. 328.
(2) 12 Ves. 298.
(3) 14 Ves. 193.
(4) 2 Coll. 648.
(5) 3 Atk. 226, 229.

v. *Hunter* (1) Lord Loughborough stated the rule that the gift of a part excludes that of the whole, and added (2): "Where there has been a specific instead of a pecuniary legacy, a distinction has been attempted to be taken, *Southcot* v. *Watson* (3), but I cannot find that it has prevailed." These cases afford no authority whatever for the proposition that, in considering whether two or more executors take equally under a will, you may bring into account specific legacies. This would be to ignore the rule and the reason for the rule. *Southcot* v. *Watson* (3) was the case of a sole executrix, and if it was intended that she should take the whole residue beneficially, this would include the household furniture and effects not otherwise disposed of, and it would not have been necessary to mention specifically this part of the personal estate.

The question is not whether all the executors take equal benefits in the whole estate; but whether any part is given to them equally, of that which would otherwise belong equally to them as undisposed-of residue; if so, the gift of this part negatives the intention that they are to take the whole. In my judgment, the fact that specific legacies are bequeathed to all or some of the executors does not in any way exclude the operation of the rule, when the will gives general pecuniary legacies of equal amount to all executors. This latter gift shews that the executors were not to take the residue beneficially.

It was contended that where the testator intended to create a trust he expressly so provided, as in the case of Joseph Burton in trust for his children, and that from this an inference can be drawn that the executors were not intended to take upon trust; but although no inference against their legal right to the residue can be drawn, from specific trusts being imposed upon them, distinct from their appointment as executors—*Pratt* v. *Sladden* (4) —yet this circumstance does not preclude the application of the rule excluding executors from taking beneficially where other circumstances, such as equal pecuniary legacies, operate to bar them.

The result is that in the present case the surviving executor is

(1) 1 Bro. C. C. 328.
(2) Ibid. 331.
(3) 3 Atk. 226.
(4) 14 Ves. 193.

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a trustee for the Crown, and there must be an order for an inquiry in the terms of the summons. The further consideration will be adjourned with liberty to apply.

Solicitors: *Solicitor to the Treasury; Stanley, Woodhouse & Hedderwick; Nicol, Son & Jones.*

J. R. B.

NEVILLE J.
1906
Nov. 13, 14.

In re WILLIAMS.
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[1906 W. 2167.]

Will—Construction—Vesting Gift to Son at Thirty-five—Discretionary Trust for Maintenance out of Income.

A testator gave all his residuary estate to trustees upon trust as to one-third part thereof to pay the income, or such part thereof as his trustees should think fit, to his son W. for his advancement, preferment, or benefit by equal weekly instalments until he should attain thirty-five, and then to pay him the corpus:—

Held, that the son took a vested interest at the testator's death and was entitled to immediate payment.

The rule laid down by Jessel M.R. in *In re Parker*, (1880) 16 Ch. D. 44, followed.

JOHN DAVIES WILLIAMS, the testator, by his will dated August 17, 1900, devised and bequeathed all his real and personal estate, not thereby otherwise disposed of, to trustees upon trust for sale and conversion, and after payment of debts, funeral and testamentary expenses, to invest the residue and stand possessed thereof, upon trust as to two-thirds thereof to pay the income thereof, or such part thereof as the trustees should think fit, to his daughter for her advancement, preferment, or benefit until she should attain the age of twenty-one years, and upon her attaining that age to pay to her the corpus of the said two-thirds of his estate, "and in trust as to the remaining one-third part thereof to pay the income thereof or such part thereof as my trustees shall think fit to my son William Alfred Williams by my first wife Jemima Williams for his advancement preferment or benefit by equal weekly instalments until he

shall attain the age of thirty-five years and upon his attaining that age then I direct my trustees to pay him the corpus of the remaining third of my estate."

The testator died on March 22, 1905, leaving his said son and daughter him surviving; the son was then twenty-five years of age and married.

This summons was taken out by the surviving trustee of the will for the determination of the question whether the said William Alfred Williams is now entitled absolutely to one equal third part of the residuary trust funds subject to the trusts of the will and to have such equal third part transferred to him.

The defendants were the testator's widow and the son and daughter, an infant aged twenty.

Cruickshank, for the summons.

Peterson, K.C., and *J. W. Greig*, for the testator's son. Where there is a gift to A. at a future time and a direction to pay the income to A. in the meantime, it is clear that the gift is vested. *Fox* v. *Fox* (1) is a decision clearly in our favour. It has been doubted, but it follows the earlier decisions of *Harrison* v. *Grimwood* (2) and *Eccles* v. *Birkett*. (3) In *In re Parker* (4) Sir George Jessel distinguished the case from *Fox* v. *Fox* (1) on the ground that the gift for maintenance was a general one for the whole class, and no aliquot share was given for the maintenance of each legatee, and that distinguishes the decision from several of the cases in which it has been doubted. In *In re Turney* (5) both Lindley M.R. and Sir F. H. Jeune expressed approval of *Fox* v. *Fox* (1), but it was not necessary to decide the point. In *In re Grimshaw's Trusts* (6) there was no gift of an aliquot share for maintenance, and there was a gift over of the accumulations. Hall V.-C. distinguishes the case on those grounds. *Dewar* v. *Brooke* (7) was decided on a different principle, because there was a gift apart from the direction to pay. Hall V.-C. pointed out that the case was wholly different, and

(1) (1875) L. R. 19 Eq. 286.
(2) (1849) 12 Beav. 192.
(3) (1850) 4 De G. & Sm. 105.
(4) 16 Ch. D. 44.
(5) [1899] 2 Ch. 739, 747.
(6) (1879) 11 Ch. D. 406, 411.
(7) (1880) 14 Ch. D. 529.

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the doubt he expresses as to whether *Fox* v. *Fox* (1) or *In re Ashmore's Trusts* (2) was to be followed was unnecessary. In *In re Ashmore's Trusts* (2) the class who were to take would not be ascertained until one of them attained twenty-one, and James L.J. (then V.-C.) only followed *Pulsford* v. *Hunter* (3), which Sir George Jessel himself explains in *Fox* v. *Fox*. (1) In *In re Martin* (4) Kay J. expressed some doubt as to *Fox* v. *Fox* (1), but in the case before him there was no division of the interest during the time for which maintenance was given. The case was within *In re Parker*. (5) *Vawdry* v. *Geddes* (6) was decided on the fact that there was a gift over on the death of any of the class before attaining the age fixed, and the same applies to *Leake* v. *Robinson*. (7) In *In re Wintle* (8) North J. expressly disapproved of the decision in *Fox* v. *Fox*. (1) But he rested his dissent on the ground that *Fox* v. *Fox* (1) was inconsistent with *Dewar* v. *Brooke* (9); and we have shewn that that is not so. In the present case the gift is not a legacy, but a share of residue, and the Court leans more strongly to vesting in such a case: *In re Gossling* (10); *In re Bunn* (11); Jarman on Wills, 5th ed. p. 809; Theobald on Wills, 6th ed. p. 563.

Langford Lewis, for the testator's widow and daughter. The testator's widow, who would be interested if the gift to the plaintiff failed, is willing that the plaintiff should take the money at once, but the testator's daughter is an infant, and on her behalf I contend that there was no vesting. *Fox* v. *Fox* (1) is a very unsafe case to follow; the only case in which it was approved is *In re Turney* (12), and there it did not apply, and the approval is of a very doubtful character. Lindley M.R. only said he was not satisfied that it was wrongly decided, and Sir F. H. Jeune said he should be glad to think it was law. *Harrison* v. *Grimwood* (13) was, the Master of the Rolls said, a very doubtful case, and he gives several reasons for his decision all turning on the

(1) L. R. 19 Eq. 286.
(2) (1869) L. R. 9 Eq. 99.
(3) (1792) 3 Bro. C. C. 416.
(4) (1887) 57 L. T. 471, 472.
(5) 16 Ch. D. 44.
(6) (1830) 1 Russ. & My. 203.
(7) (1817) 2 Mer. 363.
(8) [1896] 2 Ch. 711.
(9) 14 Ch. D. 529.
(10) [1903] 1 Ch. 448.
(11) (1880) 16 Ch. D. 47.
(12) [1899] 2 Ch. 739, 747.
(13) 12 Beav. 192.

words of the particular will. *Eccles* v. *Birkett* (1) is very shortly reported, and no judgment is given. But if *Fox* v. *Fox* (2) is good law and to be followed, this case is distinguishable on the grounds laid down by Hall V.-C. in *In re Grimshaw's Trusts* (3) that there is no gift of the whole income.

NEVILLE J. In this case I have to determine whether or no a vested interest in one third of his residuary estate was given by the testator by the following bequest. [His Lordship read the gift of one third part of the residuary bequest in trust for the testator's son above set out, and continued :—]

It is said, and I think quite accurately, that the rule is absolute that where a legacy is given at a future date accompanied by a gift of income in the meantime, the legacy vests in the legatee at once, notwithstanding the fact that he does not live until the date fixed for payment. Moreover, I think I may go one step further and say that if the whole of the income of such a legacy be given for maintenance until the time fixed for payment, that is treated as a gift of income and the legacy is vested. There is a third form of gift which is open to some doubt, and which seems to be very near the form in the present case, viz., a gift of a legacy at a future date accompanied by a gift for maintenance in the meantime of the whole or such part of the income as the trustees think fit. Many cases have been cited to me, but I do not intend to go into them in detail; I will simply state the view to which I have come. On the authorities I think the question really is whether Sir George Jessel M.R. was justified in the statement of the rule made by him in *In re Parker*. (4) He said there : "When a legacy is payable at a certain age, but is, in terms, contingent, the legacy becomes vested when there is a direction to pay the interest in the meantime to the person to whom the legacy is given; and not the less so when there is superadded a direction that the trustees 'shall pay the whole or such part of the interest as they shall think fit.'" The Master of the Rolls went on to say: "But I am not aware of any case where, the

(1) 4 De G. & Sm. 105.
(2) L. R. 19 Eq. 286.
(3) 11 Ch. D. 406.
(4) 16 Ch. D. 44, 45, 46.

NEVILLE J. 1906 WILLIAMS, *In re.* WILLIAMS *v.* WILLIAMS.

gift being of an entire fund payable to a class of persons equally on their attaining a certain age, a direction to apply the income of the whole fund in the meantime for their maintenance has been held to create a vested interest in a member of a class who does not attain that age." Now, if the statement of the rule in the former part of the passage I have read is accurate, it is clear that this case comes within it. *Fox* v. *Fox* (1) was also a decision of Sir George Jessel's. In that case there was a gift to a class in equal shares as and when they should respectively attain twenty-five, with a trust to apply the income of the presumptive share of each child, or so much thereof respectively as the trustees should think fit. Sir George Jessel held that the legacies were vested, and his judgment states the rule in rather wider terms than those in which he afterwards stated it in *In re Parker.*(2) That case has been commented on in various cases. In *In re Turney* (3), before the Court of Appeal, Lindley M.R. and Sir F. H. Jeune both commented on it with approval, but the point decided in *Fox* v. *Fox* (1) was admittedly not before the Court. In *In re Wintle* (4) North J. discussed the decision in *Fox* v. *Fox* (1), and expressed his disapproval of it. I doubt whether those two cases can stand together, but I think it possible that in this case I can come to a conclusion irrespective of the difference of opinion between the judges in those cases. There are authorities which say that a discretion given to trustees as to the application of the whole or part of the income does not alter the rule so as to prevent the legacy from vesting. There are other cases which shew that where there is a direction to apply the income for the maintenance of the whole of a presumptive class followed by a gift of the capital to such of the class as attain a vested interest, who may obviously not be the same persons as those to whom maintenance is given, there is no vesting of the legacy. In the case before me there is something quite different. I think it is clear that the testator intended his son to have the whole of the income as well as the capital of one third share of his residuary estate. It is equally clear that, doubting the capacity of his son to manage

(1) L. R. 19 Eq 286.
(2) 16 Ch. D. 44.
(3) [1899] 2 Ch. 739, 747.
(4) [1896] 2 Ch. 711.

his property, he intended to provide against payment of the capital to him until he attained the age of thirty-five. But that does not suffice to exclude the rule. He has attempted to give his son a protected interest in the income until he attained the age of thirty-five, with an ultimate gift of the corpus. The rule is therefore applicable, and the property vests in the son.

I am not at all sure that the fact that the gift to the son is a gift of residue so that any accumulations of income would follow the capital and ultimately go to the son makes any difference. But, so far as it has any effect, it is an added reason for holding that the legacy vested at once. But, treating the gift as a whole, it clearly falls within the rule laid down by Jessel M.R. in *In re Parker* (1), and I am of opinion that that rule expresses the true view of the Court with regard to this question.

Solicitors: *Schultz & Son, for Gwilym James, Charles & Davies, Merthyr Tydfil.*

(1) 16 Ch. D. 44.

J. R. B.

NEVILLE J.
1906
Nov. 24.

In re TORRINGTON AND OKEHAMPTON RAILWAY BILL.

[1905 T. 1362.]

Railway—Parliamentary Deposit—Special Act—Undertaking abandoned—Payment out of Deposit—No Abandonment Act—Parliamentary Deposits Act, 1846 (9 & 10 *Vict. c.* 20), *s.* 3—*Parliamentary Deposits and Bonds Act*, 1892 (55 & 56 *Vict. c.* 27), *s.* 1, *sub-ss.* 1, 2, 3.

Where the usual deposit has been paid into Court under the Parliamentary Deposits Act, 1846, in furtherance of a special Act subsequently passed authorizing the construction of a railway, and the undertaking is afterwards abandoned, the deposit can be dealt with by the Court under s. 1 of the Parliamentary Deposits and Bonds Act, 1892, without a special abandonment Act being obtained.

PETITION.

This was an application for the payment and transfer out of Court of a sum of Consols and cash representing a sum of 10,143*l.* paid into Court under the Parliamentary Deposits Act, 1846, in these circumstances.

In 1894 the petitioners Lockley, Molesworth, Hoare and certain other persons promoted a Bill in Parliament for the construction of a railway from Torrington to Okehampton, and for this purpose they and one Hooper borrowed from a bank on their personal guarantee the said sum of 10,143*l.*, which was paid into Court as a parliamentary deposit, and their co-adventurers agreed to indemnify them against personal liability or loss in respect of their guarantee to the bank.

In July, 1895, the Torrington and Okehampton Railway Act, 1895, was passed, whereby the petitioners and Hooper and other persons were incorporated and authorized to construct and maintain the said railway. Sect. 5 of this Act limited five years for the completion of the railway; and s. 40 provided that, if the railway was not completed within the time limited, then the said deposit "shall be applied towards compensating any landowners or other persons whose property has been interfered with or otherwise rendered less valuable by the commencement, construction or

abandonment, of the railway or any portion thereof, or who have been subjected to injury or loss in consequence of the compulsory powers of taking property conferred upon the company, for which injury or loss no compensation or inadequate compensation has been paid, and shall be distributed in satisfaction of such compensation as aforesaid in such manner and in such proportions as to the High Court may seem fit; and if no such compensation is payable, or if a portion of the deposit fund has been found sufficient to satisfy all just claims in respect of such compensation, then the deposit fund or such portion thereof as may not be required as aforesaid shall, if a receiver has been appointed or the company is insolvent or the undertaking has been abandoned, be paid or transferred to such receiver or be applied in the discretion of the Court as part of the assets of the company for the benefit of the creditors thereof, and, subject to such application, shall be repaid or retransferred to the depositors." The five years limited by s. 5 were subsequently extended by special Acts, and eventually expired on July 26, 1906.

Hooper died in 1896, and in 1904 the bank recovered judgment against the petitioners Lockley, Molesworth and Hoare, and the legal personal representatives of Hooper, in an action on the guarantee for the 10,143*l.* and interest and costs. The petitioners Lockley and Molesworth paid the whole of this judgment debt and became entitled to contribution from their co-adventurers. No part of the railway had, in fact, ever been constructed, and no lands were ever taken possession of for the purposes of the railway. No work of any kind had been done in connection with the undertaking for upwards of eight years, and the undertaking had been definitely abandoned, but no special Act for the abandonment of the railway had been obtained. The petitioners alleged that, subject to any claims by landowners or other persons and creditors as provided by s. 40 of the special Act of 1895, the funds in Court belonged to them, and they asked for a declaration that no special Act for the abandonment of the railway or undertaking was necessary before the said deposit fund could be dealt with or applied under s. 40 of the special Act of 1895 and s. 1 of the Parliamentary Deposits and Bonds Act, 1892; and that, subject to the usual inquiries as to claims by landowners or other

NEVILLE J. 1906

TORRINGTON AND OKEHAMPTON RAILWAY BILL, *In re.*

persons and creditors, the fund in Court might be paid out to them.

Hon. F. Russell, for the petition. The question now before the Court is whether a special abandonment Act is necessary. It is submitted that the deposit can be dealt with by the Court under the Act of 1892 without such a special Act being obtained. There is no direct authority on the point. Before the Act of 1892 the practice was to obtain either a warrant of abandonment from the Board of Trade or an abandonment Act. (1) In the case of *In re Manchester, Middleton and District Tramways Co.* (2) it is stated in the argument that the insertion of the words "or the undertaking has been abandoned" in s. 1 of the Act of 1892 was "merely to avoid the necessity, which previously existed, of coming to Parliament for a special Act authorizing the abandonment of a railway," and Kekewich, J. adopts that view in his judgment. In the present case those words also occur in s. 40 of the special Act of 1895.

[NEVILLE J. The observation of Kekewich J. is an obiter dictum. The words "or the undertaking has been abandoned" may be intended by the Legislature to infer that a special abandonment Act has been obtained.]

In the case before Kekewich J. no abandonment Act had been obtained, but the decision did not turn on that fact. In *Ex parte Bradford and District Tramways Co.*(3) Stirling J. made an order dealing with the rights of creditors, but it does not appear from the report whether an abandonment Act had been obtained. It is submitted that since the Act of 1892 a special abandonment Act is unnecessary.

W. M. Crowdy, for the respondents, being parties interested in Hooper's estate.

NEVILLE J. I think the evidence and the order of Stirling J. in *Ex parte Bradford and District Tramways Co.* (3) should be looked at to see if they contain any reference to an abandon-

(1) See *In re Uxbridge and Rickmansworth Ry. Co.*, (1890) 43 Ch. D. 536, 540, 557.

(2) [1893] 2 Ch. 638.

(3) [1893] 3 Ch. 463.

ment Act. (1) If they do not, the order asked for can go. There will be no declaration, but the order can be prefaced with the words, "The Court being of opinion that the undertaking has been abandoned." The usual inquiries will be directed, and the further consideration will be adjourned.

Solicitors: *Peard & Son, for Hole, Peard & Co., Bideford; Morse Hewitt & Co.*

H. L. F

HENRY LEETHAM & SONS, LIMITED *v.* JOHNSTONE-WHITE (2).

[1906 H. 3419.]

Master and Servant—Combination of Firms—Separate Businesses—Engagement of Servant by Agent on behalf of Combination—Dismissal of Servant—Covenant in Restraint of Trade—Limit of Space—Restricted Area extending to the United Kingdom—Reasonableness—Injunction.

It is competent for a principal company and its subsidiary companies, all carrying on similar though separate businesses, to engage a servant through an agent for all of them on the condition that on the termination of his service with any one or more of them he shall not enter the employment of any firm engaged in a similar business within a reasonable limitation of space.

In such a case the limit of space may under the circumstances reasonably comprise the whole area of the United Kingdom.

ACTION.

This was a motion on behalf of the plaintiffs to restrain the defendant from entering the employment of any firm in the United Kingdom of Great Britain and Ireland, carrying on a business similar to the plaintiffs, under these circumstances.

By an agreement of service dated September 18, 1905, and made between the plaintiff Sidney Leetham (called the master) of the one part, and the defendant (called the servant) of the other part, after reciting that the master was a director of the plaintiffs Henry Leetham & Sons, Limited, wheat and corn millers (called the principal company), and also of the

(1) NOTE.—Neither the order of Stirling J. nor the affidavits entered therein contained any reference to an abandonment Act.

(2) NOTE.—On Jan. 19, 1907, after this report was in print, the judgment of Neville J. was reversed by the Court of Appeal.

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following plaintiff companies (called the subsidiary companies), namely, A. & R. Appleton, Limited, the Cleveland Flour Mills, Limited, C. D. Mills, Limited, Roger Shackleton & Sons, Limited, and the Elland Flour Mills, Limited; and that the master was entering into the agreement as the agent for and on behalf of the principal and subsidiary companies, and where service under the master was referred to in the agreement it meant service for such company as the master should from time to time direct; and that the master and servant had agreed to enter into the agreement for regulating the service of the servant with either the principal company or one of the subsidiary companies; the master thereby engaged the servant to serve the principal company or one of the subsidiary companies in the capacity or sphere as the master should from time to time appoint, and the servant thereby agreed to serve the principal company or one of the subsidiary companies in such capacities upon the terms following:—

Clause 1 fixed the salary of the servant at 208*l.* per annum, payable by monthly instalments.

Clause 2 provided that the contract should be terminable by a month's notice on either side.

Clause 3 empowered the master to determine the contract without notice in the event of the servant committing a breach of the agreement.

Clause 4: "The servant hereby agrees with the master that he will not within the area of the United Kingdom of Great Britain and Ireland enter the service of any other wheat or corn miller or grain or flour factor or flour milling engineer or either directly or indirectly engage in selling or dealing in flour offals or any other articles or goods dealt in or manufactured by the principal and subsidiary companies within five years from the expiration of his engagement with either the principal or any or either of the subsidiary companies without the consent in writing of the principal company."

Clause 5 empowered the master to transfer the services of the servant from any of the companies to any other of the principal or subsidiary companies.

Clause 6 empowered the principal company on the death of

the master to appoint any other director to stand in the place of the master.

Clause 7: "All restrictions and conditions contained in this agreement which are expressed to be made with the master shall have effect and be construed as if they were made in separate agreements entered into by the servant with the principal company and each of the subsidiary companies, and may be put into force by any one of the companies named in whose actual service the servant has been at any time during the continuance of this agreement."

Clause 8 provided that the contract should be deemed to be made between the parties at the city of York.

For five months prior to this agreement the defendant was employed as a traveller at Portsmouth by the principal company, and after the agreement his services were transferred to the Cleveland Flour Mills, Limited, who employed him as a traveller in the counties of Northumberland, Durham and Yorks; but in December, 1905, in consequence of some disagreement, the latter company gave him a month's notice determining his service. In September, 1906, the manager of Henry Leetham & Sons, Limited, ascertained that the defendant had entered the employment of William Marshall & Sons, Limited, of the Victoria and Haven Roller Flour Mills at Grimsby, and thereupon the principal and five subsidiary companies and Sidney Leetham commenced this action against the defendant, claiming an injunction in the terms of clause 4 of the agreement. The plaintiffs now moved for an interlocutory order, and the motion was, by consent, treated as the trial of the action.

It appeared from the evidence that the aggregate of the debenture and share capital of the plaintiff companies exceeded 1,000,000*l.*, and that the business carried on by them was very extensive, and substantially touched every part of the United Kingdom and Ireland and the Channel Islands; that the six companies were represented in the aggregate by 139 travellers or wholesale agents, who covered every county and almost every city, town and village in England and Wales, and that they also carried on a very extensive business with depots in Scotland and Ireland and the Channel Islands; and that the agreement now

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sued on was similar in its terms to those signed by the other travellers of the plaintiffs. Also that the principal and subsidiary companies carried on distinct and separate businesses, each having its own staff of servants, agents and travellers, and working in competition with each other, except that each of the subsidiary companies was under the control of the principal company, whose directors were in the majority on every board, and had a controlling interest in shares as well as representation on the board of the subsidiary companies; and that, consistently with one of the main objects of the working partnership between the six companies, their spheres of action for business purposes were arranged so as to overlap as little as possible, and from time to time they agreed the prices to be charged for the goods and articles sold by them. The business of the Cleveland Flour Mills, Limited, was principally in the counties of Northumberland, Durham and Yorks. They also worked Leicestershire, the districts of Norwich and Plymouth, and also parts of Ireland, and they employed twenty-one travellers. The plaintiffs alleged that a restrictive area less than that mentioned in clause 4 would be insufficient to protect them from serious loss and damage to their business by reason of a representative leaving them as the defendant had done, and giving the benefit of the knowledge derived whilst in their service to other and competing firms.

The defendant deposed that during the time of his employment under the agreement of September, 1905, he acted as traveller for the Cleveland Flour Mills, Limited, alone, and did not in any way represent the principal company or any of the other subsidiary companies, and that whilst travelling the three said northern counties for the Cleveland Flour Mills, Limited, he frequently met the travellers of the other companies soliciting for orders in competition with him; that he had not furnished his present employers, Messrs. Marshall & Sons, Limited, with the names of any customers of the principal company, and had no knowledge of the extent of the businesses of the plaintiff companies other than the Cleveland Flour Mills, Limited; and that since being in the employ of Messrs. Marshall & Sons, Limited, he had never travelled for them in the said three

northern counties, but only in Norwich, Yarmouth, Lowestoft and the district round.

Bramwell Davis, K.C., and *J. M. Gover*, for the plaintiffs. It is not improper for a number of companies to combine together and employ a traveller, binding him down by restrictions which are necessary for the protection of their trade in order that when he leaves their employment he may not interfere with the trading of any of the companies. On the evidence the restrictive covenant is absolutely necessary for the protection of the plaintiffs' trade, and is therefore not unreasonable, nor, under the circumstances, are the limits of the United Kingdom too wide or extensive an area of space.

Jenkins, K.C., and *F. M. Preston*, for the defendant. There are two objections: First, the action is wrongly constituted, because under clause 7 the agreement is to be construed as a separate contract entered into by the defendant with the company in whose actual employment he has been. That company is the Cleveland Company, and they alone ought to be the plaintiffs. If this view is correct, then the business of the Cleveland Company alone is to be considered, and it is clear that the area of restriction is wider than is reasonably necessary for their protection, and therefore the covenant is bad. But if this view is erroneous, then it is submitted that the covenant is unreasonable and oppressive and in restraint of trade, and therefore void: *Mineral Water Bottle Exchange and Trade Protection Society* v. *Booth*. (1) No consideration passed from the other companies, and there is no case in the books like the present. It is oppressive and illegal to make a man sign a covenant that, when he leaves A.'s employment, he will not only observe A.'s business, but also the business of B. C. and D. If the covenant is enforced, it prevents the defendant from being employed by any other miller in the United Kingdom and Ireland, and debars him from earning a living.

No reply was called for.

NEVILLE J. In this case I am unable, on the construction of the agreement, to come to the conclusion that the terms imposed

(1) (1887) 36 Ch. D. 465.

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are contrary to the law in this country as it stands to-day. It has been suggested in argument that by clause 7 of the agreement the effect of the earlier clauses have been so modified as to reduce the liability on the part of the employee to the consideration of the interests of the actual company in whose employment he happened to be when his service was determined. I think, however, that clause 7 was only intended to operate for the convenience of litigation. In my opinion it is competent for several companies, all engaged in the same kind of business, to engage a servant through an agent for all of them on the condition that on the termination of the connection he shall not enter the employment of firms engaged in a similar business within a reasonable local limitation. From that point of view it is quite clear from the evidence that the whole of the United Kingdom and Ireland and the Channel Islands come within the trading area of the plaintiff companies, considered in the aggregate, although it is quite true that in the case of each particular company their local interests are more limited. The result is that I am compelled to come to the conclusion that this agreement was lawfully entered into between the employers and employed, and, having in mind only the interests of the employers, it was not an unreasonable agreement in the sense that it was wider than was reasonably necessary for the protection of their trade and therefore merely vexatious and arbitrarily restrictive of the man's right to earn his own living. There is no branch of the law I am called upon to administer that I administer with more reluctance than I do that in this case. The increasing frequency of actions of this kind shews the exceeding pressure which is placed on the working commercial population in this country by the state of the law as it stands at present. In old times the general idea was that contracts in restraint of trade were to be looked upon at all events with suspicion by the Courts. In modern times, however, the doctrine has, unhappily I think, prevailed that in questions between employer and employed the interests of the employer alone are to be considered, and that no agreement is invalid, however oppressive and however fatal it may be to the possibility of the employee earning his own living in this country, if it is reasonably necessary for the protection

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of the employer. But I am here to administer the law as I find it, and I must grant the injunction which is asked, and, as this motion is to be treated as the trial of the action, it must be with costs.

Solicitors: *Griffith & Gardiner, for R. Newbold Kay, York; Norris, Allens & Chapman, for North, Kirk & Co., Liverpool.*

H. L. F.

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Nov. 2, 3, 5, 19.

GRIFFITH *v.* OWEN.

[1906 G. 539.]

Mortgage — Purchase from Mortgagee by Father of Infants — Liability to Account.

J. by will gave N. House and M. House to his daughter S., the wife of O., for life, with remainder to their children as tenants in common, and gave B. House, W. House, and Y. House to the children of J. J. equally. At the death of J. the children were infants, and N. House, M. House, and B. House were comprised in a single mortgage to X. to secure 1350*l.*, while W. House and Y. House were subject to several mortgages to other persons. S. and O. and J. J. determined that, to give effect to the will, the mortgage debt of 1350*l.* should be apportioned between N. House and M. House on the one hand and B. House on the other. O. and J. J. communicated with X., the mortgagee, and it was arranged that N. House and M. House should be purchased by O. and B. House, W. House, and Y. House by J. J. for amounts equal to the sums due on the mortgages, there being no valuation or bargaining, or evidence of the previous intention of the mortgagees to sell, although the power to sell had become exercisable. O. at once began to look out for sub-purchasers of N. House and M. House, and in March, 1880, a sub-purchaser of N. House having been found to buy it, O. raised the balance of the purchase-money payable by him on a mortgage of M. House. On completion the properties were conveyed to O. and J. J. respectively in the manner and with the recitals usual in the case of mortgagees selling under their powers of sale, and O. conveyed N. House to the sub-purchaser and mortgaged M. House for the balance. The value of the two houses was at least 1580*l.*, whereas O. paid only about 1246*l.* for them. S. died in 1882:—

Held (applying the principles of *Keech* v. *Sandford*, (1726) Sel. Cas. 61; 2 W. & T. 7th ed., p. 693), that O. was a trustee of N. House and M. House (subject to the life interest of S.) for the children of O.

JOHN JONES the elder by his will, dated February 21, 1879, gave two houses in Colwyn Bay, known as Nelson House and

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Manchester House, to his daughter Sarah Jane Owen for life, with remainder to her children as tenants in common, and he gave three other houses in Colwyn Bay, known as Bodorgan House, Wellington House, and Blucher House, to the children of his son John Jones the younger equally between them; and he appointed an executor, but his will contained no residuary devise or bequest, and his only property at his death, which occurred early in March, 1879, consisted of the several houses mentioned in his will. At his death all the five houses were in mortgage, Nelson House, Manchester House, and Bodorgan House being comprised in a single mortgage for 1350*l.*, then vested in one Edward Morris, and Wellington House and Blucher House being subject to several mortgages which were about to be paid off out of a sum of 600*l.* which Edward Morris was proposing to advance on a mortgage of those houses. At the date of the testator's death his daughter Sarah Jane Owen had four children, who were the plaintiffs in the present action and were then infants, and his son John Jones the younger also had several infant children. After the testator's funeral his will was read over by a Mr. Webster, who had formerly acted as his solicitor, in the presence of Sarah Jane Owen, her husband Thomas Owen (the defendant in the present action) and of John Jones the younger; and his Lordship found that all three of them were made fully aware of the contents of the will. After the reading of the will the defendant and his wife discussed with John Jones the younger what was best to be done, and it was determined that effect should be given to the will without going through the formality of probate, and that for this purpose the mortgage debt of 1350*l.* should be apportioned between Nelson House and Manchester House on the one hand and Bodorgan House on the other, the basis on which the apportionment was to be made being left for future consideration, and the mortgagee being approached in the meantime in order that his consent to the apportionment might be obtained. Accordingly on March 20, 1879, John Jones the younger wrote to the mortgagee a letter describing what was proposed substantially in the way stated above, and in it John Jones announced his intention of paying off that part of the 1350*l.* mortgage which was apportioned to

Bodorgan House and the mortgage on Wellington House. His Lordship inferred from this letter that the defendant had already communicated with the mortgagee, though he did not recollect this; and held that up to this point both John Jones the younger and the defendant were acting in the interests of their respective families, their object being to give effect to the will, and the only difficulty being the apportionment of the single charge which covered properties which, under the will, passed to different persons.

From this point the matter passed into the hands of the solicitors for the parties concerned, Messrs. Bridgman & Co. acting for John Jones, Messrs. Birch, Cullimore & Douglas acting for the defendant, and Messrs. Talbot & Woosnam acting for Edward Morris, the mortgagee; and in April, 1879, there was an interview between Messrs. Bridgman & Co. and John Jones upon the matter, and on April 17, 1879, Messrs. Bridgman & Co. wrote to John Jones as follows:

"Dear Sir, re John Jones, deceased. Colwyn property. We received your letter this morning, and will proceed to negotiate for the purchase by yourself and brother-in-law, Mr. Owen, of the three houses in mortgage to Mr. Edward Morris, on the basis that you are each to take such property as devised by the will of your late father, and pay the total amount of purchase-money and costs in proportion to the rents now received from same which we believe is as follows: Nelson House 25*l.*, Manchester House 60*l.*, Bodorgan House 25*l.*, total 110*l.*, and this being divided into eleven parts, you will have to pay two and a half elevenths and Mr. Owen eight and a half elevenths of the whole sum."

On the same day Messrs. Bridgman & Co. wrote in similar terms to the defendant, and these letters contained the first suggestion of a purchase from the mortgagee, though his Lordship thought it had probably been already mentioned at the interview between John Jones and Mr. Bridgman, and said he was satisfied that neither John Jones nor the defendant ever contemplated paying Morris and the other mortgagees more than what was due to them on their mortgages, and that John Jones still considered himself to be acting in the interests of his children,

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and was indifferent how the matter was carried through provided that he secured for them the property to which they were entitled under his father's will, subject to the mortgages thereon, or a proper apportioned part thereof. The defendant Owen at once began to look around for a sub-purchaser of Nelson House and Manchester House at such prices as would leave a surplus after paying off that part of the mortgage debt properly attributable to those houses, knowing, as his Lordship found, of his children's interest, and considering, like John Jones, that in looking out for a sub-purchaser he was acting in the interests of his family; or, in other words, looking upon the suggestion made by Messrs. Bridgman & Co. as to a purchase, not as superseding, but as a method of giving effect to, the provisions of the will.

On the same April 17, 1879, Messrs. Bridgman & Co. wrote to Morris's solicitors stating that John Jones and the defendant Owen desired to buy the properties, and that the matter was a complicated one, and could be best discussed at a personal interview, and they enclosed a copy of the will of John Jones the elder. Messrs. Bridgman & Co. accordingly had an interview with Morris's solicitors, the result of which was that the mortgagee consented to sell the properties to John Jones and Thomas Owen for the amount due on the mortgage. There was no evidence of any valuation, or bargaining as to price, or that the mortgagee had any intention of selling the property prior to being approached by Messrs. Bridgman & Co.; but the last instalment of interest on the mortgage was in arrear, and the power of sale contained in the mortgage had therefore become exercisable. The defendant Owen answered Messrs. Bridgman & Co.'s letter of April 17, and, although the answer was not forthcoming, it led to a suggestion by Bridgman & Co. that John Jones should purchase all the properties on his own account and thus be able to dictate his own terms if the defendant desired to take over Manchester House and Nelson House. The defendant Owen also took the letter of April 17 to Messrs. Birch, Cullimore & Douglas, who on April 19 wrote to Bridgman & Co. for an explanation of the proposed arrangement, their difficulty being that it could hardly be proposed to sell the properties at an under-value, and that if sold for full value it was not obvious how

the surplus moneys should be dealt with. The explanation asked for was given verbally at an interview between Mr. Birch and Messrs. Bridgman & Co. prior to April 24, when, according to Mr. Birch, who was called as a witness, he was told that it had been arranged to purchase the properties from Morris for the amount due for principal, interest, and costs, and that this was in order to give effect to the provisions of the will, John Jones purchasing the property left to his children and the defendant the properties in which his family was interested. This satisfied Mr. Birch, who did not further inquire as to values.

Certain letters followed, and His Lordship expressed the opinion that the arrangement sketched out between Messrs. Bridgman & Co. and the mortgagee's solicitors and the proposed arrangement for winding up the matter mentioned in these letters amounted to an arrangement for purchasing the property in order to give effect to the provisions of the will of the testator John Jones. There was considerable delay in completing the transaction owing to difficulties as to boundaries and the division of a yard held in common; but John Jones, immediately after the testator's death, entered into possession or receipt of the rents of the properties left to his children, and the defendant Owen, who in right of his wife was tenant for life, similarly entered into possession or receipt of the rents and profits of Nelson House and Manchester House. Further delay was caused by a dispute as to a cellar and as to the apportionment of the moneys due on the mortgage between the various properties.

During the delay further interest accrued due on the mortgage to Morris, and certain payments on account of interest were made by John Jones and the defendant Owen respectively to the mortgagee, care being taken, under the advice of their solicitors, that some interest should be left unpaid so that the power of sale might not cease to be exercisable. The disputes between John Jones and the defendant with regard to boundaries was arranged through a surveyor employed for the purpose, and the dispute as to the apportionment was referred to the decision of another gentleman. The correspondence as to the reference treated the matter to be referred as the proportions in which

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the mortgage debt and interest were to be borne by John Jones and the defendant respectively; but the actual agreement for reference contained a recital that they had agreed with the mortgagee to purchase the property. The award, dated October 23, 1879, determined that the mortgage debt and interest should be borne as to two-ninths by John Jones and as to seven-ninths by the defendant. There was still further delay in completing the matter, arising partly from the fact that the defendant could not find the money. The transaction was, however, ultimately completed on March 30, 1880, the defendant having by that time found a sub-purchaser of Nelson House for 380*l.* and arranged to raise the residue, or the greater part thereof, by a mortgage of Manchester House to Mr. Birch. On completion the five houses were conveyed to John Jones and the defendant respectively in the manner and with the recitals usual in the case of mortgagees selling under their power of sale. At the same time the defendant conveyed Nelson House to his sub-purchaser for 380*l.*, and mortgaged Manchester House to Mr. Birch or his firm for 750*l.* or thereabouts. Mr. Birch also appeared to have made arrangements for an advance to John Jones of 650*l.* on Wellington House and Blucher House and 300*l.* on Bodorgan House, though there was no evidence as to whether those advances were actually made, or by whom. Both John Jones and the defendant, after the completion of the transaction, dealt with the properties acquired by them as their own. John Jones shortly afterwards sold Bodorgan House for 800*l.*, and subsequently sold both Wellington House and Blucher House. He made money out of the transaction, but did not account to his children, although he was ready to do so. His children, however, knew all about the matter, and, the relations between them and their father being of the friendliest kind, they did not press for any payment. At the time of the trial the defendant Owen still held Manchester House, which was said to be worth 6000*l.* or 7000*l.*, and he claimed to retain the same as his own property. With regard to the value of the several properties at the date when the transaction took place, Nelson House was sold immediately for 380*l.*, the defendant having asked 400*l.* for it and been refused; and a bona fide offer of 1200*l.* was shortly afterwards

made for Manchester House, but refused by the defendant. From this and the oral evidence as to value, his Lordship found that Nelson House and Manchester House were together worth at least 1580*l.*, whereas the defendant Owen paid for them only some 1246*l.*; and that the property was worth considerably more than was given for it, and that both John Jones and the defendant Owen believed that the equity of redemption was of considerable value. There being no trace of any bargaining as to price, he drew the inference that the mortgagees consented to exercise their powers to give effect to the arrangement between John Jones and the defendant Owen as representing the parties interested in the equity of redemption.

Sarah Jane Owen died in 1882, and the plaintiffs Hannah Mary Griffith, Edward Reginald Owen, Winnifred Owen, and Griffith Morris Owen were the children of the marriage between Sarah Jane Owen and the defendant Thomas Owen Owen.

In March, 1906, the plaintiffs commenced the present action against the defendant, claiming—(1.) a declaration that the defendant acquired Nelson House and Manchester House upon his alleged purchase of the same, as trustee for the plaintiffs (as to the remainder to which they were entitled in the same expectant on the death of Sarah Jane Owen), subject to the defendant being indemnified in respect of the price paid upon such alleged purchase, with interest thereon, and that the defendant was still a trustee for the plaintiffs of Manchester House, and of the proceeds of sale of Nelson House; (2.) an order on the defendant to convey Manchester House to the plaintiffs; (3.) an account against the defendant in respect of the rents and profits of Manchester House and (until the sale of the same) of Nelson House, such account to be taken on the footing of wilful default; (4.) an account of the proceeds of sale of Nelson House and of the interest thereon.

Buckmaster, K.C., and *E. P. Hewitt*, for the plaintiffs. The defendant was the guardian of his children, the plaintiffs, and in a fiduciary position towards them; therefore he could not buy these houses for his own advantage. He bought them to his knowledge at an under-value and must account for the profit he

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has made: *Ex parte Grace* (1); *Griffin* v. *Griffin* (2); *Robinson* v. *Pett* (3); *Kennedy* v. *De Trafford* (4); *In re Biss.* (5)

[PARKER J. You have to prove such a fiduciary relation that the doctrine of *Keech* v. *Sandford* (6) will apply. It is not applicable to all cases of trustees: *Bevan* v. *Webb.* (7)]

The Statute of Limitations is no defence: *Mathew* v. *Brise.* (8)

Romer, K.C., and *George Lawrence*, for the defendant. The only question is whether there was a bona fide sale or whether the defendant was a trustee. If he was a trustee we cannot rely on the Statute of Limitations, nor on acquiescence, as grounds of defence.

The plaintiffs' contention is based on a misconception of the effect of *Keech* v. *Sandford* (6) and the other cases cited. The doctrine is that where a lease is settled and held by a trustee a sort of goodwill or trust attaches to a renewed lease of which the trustee is the legal owner, and that if there is any renewal it is held for the benefit of the cestui que trust. This doctrine does not rest entirely on fiduciary relation, but where there is not that relation it is open to the person who obtained the renewal to shew that he got it by outside means, whereas a trustee is not allowed to adduce such proof: *In re Biss.* (5) The same principles are applied in the case of a trustee for sale purchasing trust property: *Fox* v. *Mackreth.* (9)

But those principles do not apply here. It is contended that any acquisition by a trustee of property subject to a trust can, however acquired by him, be only held subject to the trust, but there is no authority for the proposition, and there is direct authority against it.

Where there is no custom or contract by which a lease is renewable a trustee of the existing lease may buy the reversion for his own benefit: *Bevan* v. *Webb.* (7)

The onus of proving that the transaction is unfair is on the

(1) (1799) 1 Bos. & P. 376.
(2) (1804) 1 Sch. & Lef. 352.
(3) (1734) 3 P. Wms. 249, 251, note (*a*).
(4) [1896] 1 Ch. 762; [1897] A. C. 180.
(5) [1903] 2 Ch. 40.
(6) Sel. Cas. 61; 2 W. & T. 7th ed. p. 693.
(7) [1905] 1 Ch. 620.
(8) (1851) 14 Beav. 341.
(9) (1788) 2 Bro. C. C. 400; 2 Cox, 320.

persons impeaching it, at any rate after many years have elapsed. In this case the plaintiffs have not sustained the onus cast upon them.

Buckmaster, K.C., in reply.

Cur. adv. vult.

1906. Nov. 19. PARKER J. In this action the plaintiffs claim to have it declared that the defendant acquired and holds as trustee for them certain houses in Colwyn Bay, which in the year 1880 were conveyed to him by a mortgagee in exercise of a power of sale contained in his mortgage. The plaintiffs contend—(1.) that, on the principle of the leading case of *Keech* v. *Sandford* (1), the defendant, who in right of his wife was tenant for life in possession of the property, subject to the mortgage, was incapable of purchasing the same otherwise than for the benefit of himself and the persons entitled in remainder; (2.) that as their father and guardian he was under a similar incapacity; and (3.) that the transaction was not, under the circumstances to be mentioned hereafter, a real purchase, and, even if looked upon as a real purchase, was, to the defendant's knowledge, a purchase at such an under-value that it cannot be upheld against the other persons interested in the equity of redemption. The defendant, on the other hand, contends that the propositions of law raised by the plaintiffs are erroneous, and further denies that the transaction was on his part other than a bona fide purchase at full value.

The defence contained the allegation that the defendant did not himself purchase from the mortgagees, but from John Jones the younger, who had purchased from them. He asserted this again and again in the witness-box, but on this point I do not believe his evidence, and, indeed, his counsel did not attempt to argue the point. The defence also contained pleas based on the Statutes of Limitation, laches, delay, acquiescence, and the rules of the Court against stale demands, but these pleas were abandoned at the trial. The principle of *Keech* v. *Sandford* (1) is primarily applicable to renewal of leases, and depends partly on the nature of leasehold property and partly on some fiduciary

(1) Sel. Cas. 61; 2 W. & T. 7th ed. p. 693.

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relationship or duty existing on the part of the person whom it is sought to declare a trustee towards the persons who seek to have the trust declared. In the case both of leases renewable by right or custom and of leases not so renewable the renewal is prima facie considered to have been obtained by virtue of the interest which the person obtaining the renewal has in the property, and accordingly the renewed lease is prima facie looked on as a graft on the original interest and subject to the same trusts or limitations. In some cases the person who obtains the renewal is allowed, in others he is not allowed, to shew that, in spite of the nature of the property, there is in the particular circumstances nothing inequitable in his claiming the renewed lease for his own benefit. Whether he is or is not allowed to do this depends on the particular fiduciary relationship or duty existing on his part: see the judgment of Collins M.R. in *In re Biss.* (1) Thus a trustee is never allowed to do this, but a mortgagee is. I think it clear, however, that when once the fiduciary relationship or duty is established on the part of the person obtaining the renewal the onus of proving that there is nothing inequitable in his claiming to retain the benefit for himself rests with him. The principle of *Keech* v. *Sandford* (2) has been extended to purchases of reversions on leasehold property when the leaseholds are renewable by custom: *Phillips* v. *Phillips* (3), following certain dicta in *Randall* v. *Russell* (4); but it has been held not to apply to the purchase of reversions on leaseholds when there is no right or custom of renewal: see *Randall* v. *Russell* (4); *Longton* v. *Wilsby.* (5)

Though the decision in *Phillips* v. *Phillips* (3) is stated to be an extension of the principle of *Keech* v. *Sandford* (2), the analogy between the two cases is somewhat imperfect. It cannot be said that a person buying the reversion on a lease prima facie does so by virtue of any interest in the leaseholds. Otherwise the extension of the doctrine of *Keech* v. *Sandford* (2) would cover purchases of reversions in every case, whether the lease was renewable by custom or otherwise, for the fact that

(1) [1903] 2 Ch. 40.
(2) Sel. Cas. 61; 2 W. & T. 7th ed. p. 693.
(3) (1885) 29 Ch. D. 673.
(4) (1817) 3 Mer. 190.
(5) (1897) 76 L. T. 770.

there is a custom to renew cannot, I think, make any difference in this respect. It seems to me that the real ground of the extension is that stated by Sir William Grant in *Randall* v. *Russell.* (1) "If," he said, "Mrs. Russell had purchased from the college, it might be said, that she thereby intercepted and cut off the chance of future renewals, and, consequently, made use of her situation to prejudice the interests of those who stood behind her; and there might be some sort of equity in their claim to have the reversion considered as a substitution for those interests," an equity which was established in *Phillips* v. *Phillips.* (2) If this be so, the principle would not be applicable to purchases of reversions on leases renewable of right, as distinguished from custom, because, there being no merger, the persons interested in the leaseholds could not be prejudiced. On the other hand, if it were proved affirmatively that the purchase of a reversion had only been obtained by virtue of the purchaser being interested in the leaseholds—e.g., because the landlord was giving all his leaseholders an opportunity to enfranchise their holdings—I see no reason why, if there existed on the part of the purchaser the necessary fiduciary relationship or duty, the principle of *Keech* v. *Sandford* (3) should not be applied whether the lease were renewable of right or not renewable at all. From this standpoint both the decisions as to the renewal of leaseholds and those as to the purchase of reversions may be looked upon as instances of that more general equity which governs the personal capacity of persons on whose part there is some fiduciary relationship or duty in matters affecting the interests of those towards whom the fiduciary relationship or duty exists.

In the present case I am asked to apply the principles underlying the case of *Keech* v. *Sandford* (3) to the purchase by a trustee or tenant for life from a mortgagee exercising his power of sale of property the equity of redemption in which is the subject of the action. It is obvious that where, as in the present case, the purchase is for a sum which does not exceed the money due on the mortgage the whole subject-matter of the settlement is destroyed by the purchase, and this seems to me to bring the

(1) 3 Mer. 197.
(2) 29 Ch. D. 673.
(3) Sel. Cas. 61 : 2 W. & T. 7th ed. p. 693.

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case within the principle of *Keech* v. *Sandford* (1) as applied to purchases of reversions. It is said, and no doubt truly said, that no case can be found where the principle has been applied to such a purchase, but I cannot suppose that a trustee of an equity of redemption could in equity be allowed in such a case to retain the property for his own benefit, and it seems to me that the duty of the tenant for life towards the remaindermen which precludes him from destroying their chance of renewing a leasehold by a purchase of the reversion for his own benefit ought equally to preclude him from destroying the subject-matter of the settlement altogether by purchasing for his own benefit from mortgagees who have an overriding power of sale. Though there seems to be no case on the subject, I observe that throughout the arguments in *Kennedy* v. *De Trafford* (2) there is no suggestion that such a purchase would not be within the principle if the necessary fiduciary relationship or duty on the part of the purchaser were once established, though the decision in that case turned upon the absence of such relationship or duty.

It was further suggested in the course of the argument that, even if the principle of *Keech* v. *Sandford* (1) is applicable, it would be open to the tenant for life to rebut what in *In re Biss* (3) is described as the presumption of personal incapacity. The Master of the Rolls in that case treats the tenant for life as a person who on grounds of public policy would not be allowed to rebut the presumption in cases arising out of the renewal of leaseholds. As will appear hereafter, I do not think it is necessary to consider whether this applies to the present case, nor need I consider whether the fact that the tenant for life was a guardian of his infant children has imposed on him any further or additional disability. [His Lordship stated the facts of the case, the substance of which is given above, and concluded as follows:—] The result is that in my judgment the defendant has by no means discharged the onus which I have held to lie upon him. Indeed, I have come to the conclusion upon the whole of the facts before me, and in cases of conflicting

(1) Sel. Cas. 61; 2 W. & T. 7th ed. p. 693.

(2) [1896] 1 Ch. 762; [1897] A. C. 180.

(3) [1903] 2 Ch. 40.

evidence having regard to the credibility of the several witnesses as shewn by their behaviour in the witness-box, that both John Jones and the defendant did not consider that they were acquiring the properties for themselves at the expense of their children, but looked upon themselves as acting in the interests of their respective families and giving effect to the provisions of the will of John Jones the elder, the difficulty being a proper apportionment of the mortgage, and this difficulty being obviated by the consent of the mortgagee to convey under his power of sale on payment of principal, interest, and costs. In my judgment, therefore, the action succeeds.

His Lordship made a declaration that the defendant was a trustee of Manchester House and Nelson House (subject to the life interest of Mrs. Owen, who died in 1882) for Mrs. Owen's children, and ordered the defendant to pay the costs up to and including judgment. The precise form of accounts and inquiries stood over for further argument, if necessary.

Solicitors for plaintiffs: *Cunliffes & Davenport, for Chamberlain & Johnson, Llandudno.*

Solicitors for defendant: *Meredith, Roberts & Mills, for Birch, Cullimore & Douglas, Chester.*

F. E.

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May 1, 2, 3, 4, 8; *June* 28; *July* 2, 3, 17.

MILNER'S SAFE COMPANY, LIMITED *v.* GREAT NORTHERN AND CITY RAILWAY COMPANY. (1)

[1905 M. 3237.]

Way, Right of — Easement — Messuages in City of London — Warehouses — Dwelling-houses—Passage—Way of Convenience—Common Owner—Severance by Devise—Implied Grant—Extent of Right—User for Domestic and Business Purposes—Change in Character of one Dominant Tenement—Substitution of Railway Station—Original Easement—Impossibility of Exercise—Suspension—Rights of Owners of Easement inter se—Injunction.

A testator, who died in 1832, devised several freehold houses in the City of London "with their appurtenances" to various devisees. They were adjoining houses and had been built by the testator, each of them being partly a dwelling-house and partly a warehouse. They all communicated with a passage, a cul-de-sac, which ran along the backs of the premises into a side street, and had been constructed by the testator for the convenience of the several houses, and had always been used in connection with them. The testator did not devise the passage or make an express grant of any rights of way over it to his devisees. The plaintiffs, who owned the two houses abutting on to the passage at its open end, and the defendants' predecessors in title, who owned the adjoining house higher up the passage, had for many years used the passage for loading and unloading vans for the purposes of their respective businesses. The plaintiffs now sought to restrain the defendants, who had acquired, and built a railway station upon, the site of the last-mentioned house, from obstructing the passage by using and inviting their passengers to use it as a thoroughfare to or from their station:—

Held—(1.) That a grant to the several devisees of a right of way contemplating such user as would be required for business as well as domestic purposes must be implied from the surrounding circumstances.

Pearson v. *Spencer*, (1863) 3 B. & S. 761, and *Phillips* v. *Low*, [1892] 1 Ch. 47, applied.

(2.) That a railway station was not and could not have been in the contemplation of the testator, and was, both in construction and mode of occupation, something entirely different from any dwelling-house, warehouse, or even manufactory, that could have been erected on the land; and

(3.) That the defendants having made it impossible that the passage should be used by them for the purposes for which it was designed, and

(1) This report has been delayed by reason of an appeal, which was ultimately compromised. See p. 229, post.

for which it had in fact been used, their right was not, under the present circumstances, exercisable at all.

The principle enunciated by James L.J. in *Wimbledon and Putney Commons Conservators* v. *Dixon*, (1875) 1 Ch. D. 362, 368, applied as between the several grantees of a right of way.

Semble, that a right of way thus suspended is capable of being revived.

The construction of an implied grant of a right of way by evidence of user, exemplified.

WITNESS ACTION.

The plaintiffs were the owners of No. 28, Finsbury Pavement, and No. 1, West Street, both in the City of London. The former was a corner house in the angle formed by the junction of Finsbury Pavement and West Street, and fronted westward on to Finsbury Pavement. No. 1, West Street, was a contiguous house in the rear and to the east of No. 28, Finsbury Pavement, and fronted south on to West Street.

The defendants were the owners of a plot of land formerly the site of Nos. 30 and 32, Finsbury Pavement, but now the site of one of their underground railway stations. No. 30, Finsbury Pavement, had adjoined the north side of No. 28, Finsbury Pavement.

Along the back of Nos. 28, 30, 32, 34, and 36, Finsbury Pavement, and running along and through a gateway under the east side of No. 1, West Street, there was a passage, which at its south end, led into West Street, but which had no opening at its north end, No. 38, Finsbury Pavement, having been built across the line of it. At its commencement under No. 1, West Street, and further on, the passage was ten feet wide, but at the corner of No. 30, Finsbury Pavement, its width narrowed down to 6 ft. 6 in., and from a point a little further on down to the other end of the passage it was only five feet wide.

All the above-mentioned houses in Finsbury Pavement and also No. 1, West Street, had been erected originally by John Lee hereinafter mentioned, and had been used partly for domestic and partly for business purposes. All the houses except No. 1, West Street, were in a row fronting on to Finsbury Pavement, and they and also No. 1, West Street, communicated with the passage in question, which had been constructed for

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the convenience of the houses and had been always used in connection with them.

The land upon which the houses were built had originally formed part of Moorfields, and the site of No. 32, Finsbury Pavement, had been demised by the Corporation of London to John Lee and Henry Lee by an indenture of lease dated May 4, 1820, for eighty-one years from Christmas, 1818, and by another lease of even date, and made between the same parties, the site of Nos. 28 and 30, Finsbury Pavement, and No. 1, West Street, had been similarly demised for a like term. These leases subsequently became vested in John Lee solely, and the latter lease was assigned to a trustee for him. By an indenture dated March 21, 1822, John Lee acquired the freehold reversion to the premises comprised in the two leases, the lease of the site of No. 32, Finsbury Pavement, becoming thereby merged.

John Lee died on June 20, 1832, having by a codicil dated December 6, 1828, to his will dated August 25, 1825, devised the freehold houses in question "with their appurtenances" in different parcels and upon different limitations. The plaintiffs derived title to No. 28, Finsbury Pavement (acquired by them in 1876), and to No. 1, West Street (acquired by them in 1905), under one set of limitations, and the predecessors in title of the defendants claimed Nos. 30 and 32, Finsbury Pavement, under other limitations. The devise did not expressly give any rights of way over the passage.

The term created by the lease of May 4, 1820, became merged in the respective freehold reversions of the premises as follows: As to No. 28 in 1850, as to No. 30 in 1857, and as to No. 1, West Street, in 1851.

It did not appear that the testator was in personal occupation of any of the houses, and although in the several devises each house was described as in the occupation of some particular person, there was nothing, except with regard to No. 30, to shew whether the houses were occupied by tenants under leases or otherwise. At the date of the devise and of the testator's death, No. 30, Finsbury Pavement, was subject to a lease dated January 18, 1821, and made between the testator and Henry Lee of the one part, and John Ede and John Bond of the other

part, whereby "all that piece or parcel of ground together with the messuage or tenement . . . . and warehouse behind the same thereupon erected," therein described and being No. 30, Finsbury Pavement, "together with free liberty of ingress egress and regress way and passage to and for the said John Ede and John Bond their executors administrators and assigns and their and every of their servants workmen and others from time to time at all reasonable hours during the term hereinafter mentioned into from and out of the back part or rear of the premises hereby demised by through over and along a gateway or passage leading therefrom into the aforesaid new street," being West Street, "nevertheless in common with the tenants and occupiers of all and every other the messuages or tenements adjoining or contiguous to the same gateway or passage and communicating therewith," were demised to John Ede and John Bond for 78¾ years from Christmas, 1820.

There was no evidence to shew for what purpose the passage was actually used at or immediately after the date of the codicil, or of the testator's death. It appeared, however, that in later years the predecessors of the plaintiffs in the occupation of No. 28, Finsbury Pavement, in connection with their business of trimming manufacturers frequently and regularly had goods delivered and taken away by railway companies' vans from a loading dock in the passage. The plaintiffs had occupied No. 28, Finsbury Pavement, for about thirty-two years, and had continued to use the passage in like manner, the main difference being that the heavy goods of the plaintiffs necessitated the provision of a temporary staging two feet high, so arranged as to admit of the goods passing between the loading dock and the plaintiffs' own vans, which were backed up the passage. Whilst the staging was in place during the loading or unloading of a van, it was practically impossible for anyone to pass, and those who did pass had to cross the staging.

The defendants' predecessors in the occupation of No. 30, Finsbury Pavement, were Messrs. Herring, paper manufacturers, and it appeared that they had used the passage in a similar manner, their goods being delivered by means of a van backed up the passage.

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There was no user of the passage of so obstructive a character by the occupiers of any of the other houses, but a wine merchant, who for a time occupied one of them, had his goods delivered on a barrow, and house refuse from all the houses was carried down in dustbins and emptied into a cart in West Street. It did not appear that the passage had been much used as an approach to the back entrances of the houses by persons on foot.

In the gateway at the southern end of the passage there were iron gates, which were kept padlocked during the night when the passage was not required, but were kept open during the working day. There had been three keys of these gates, one kept by Messrs. Herring, one by a doctor occupying one of the houses at the north end, and the third by the plaintiffs. The regulation of the gates was for a time provided for by an agreement dated December 31, 1874, between the plaintiffs and Messrs. Herring's landlord, whereby it was agreed—(1.) that the gates should be maintained for preventing the intrusion of unauthorized persons on the passage; (2.) that the gates should be kept closed except when being used by the parties thereto, or any person claiming under them or either of them; (3.) that such parties and person should be at liberty to have a key to the gates and to use the same, and should not obstruct each other in the reasonable use of the passage; and (4.) that it was not intended thereby to make any admission with regard to the property in the land the site of the passage, nor as to the right or claim of any person not party thereto or claiming as aforesaid to use the same.

Of late years the plaintiffs had undertaken the duty of locking and unlocking the gates night and morning, but there did not appear to have been any difficulty in the occupiers of the other houses having the gates opened if and when they required to use the passage.

In exercise of its statutory powers the defendant company had recently acquired the sites of Nos. 30 and 32, Finsbury Pavement. The defendant company also took power under its private Act of 1902 to acquire (inter alia) the passage in question for the purposes of the railway, but that power was never exercised, and expired in August, 1905. The defendant company

pulled down the two houses Nos. 30 and 32, Finsbury Pavement, and constructed in their place an underground railway station, having one of its entrances opening into the passage. For nearly two years the defendant company had invited passengers desirous of going into or coming from West Street to pass along the passage instead of entering at the front of the station in Finsbury Pavement, and at all times in the day, and especially in the morning and evening, a large number of passengers so used the passage. The defendant company also insisted on unlocking, and keeping unlocked, the iron gates at the gateway end of the passage at times when, under the arrangement above mentioned, they were previously closed.

The plaintiffs complained that the use of the passage by the passengers of the defendant railway company seriously obstructed and interfered with the plaintiffs' use and enjoyment of the passage, and commenced this action for a declaration that the defendant company was not entitled to use the passage as a thoroughfare for passengers to or from its station at Finsbury Pavement; and for an injunction to restrain the defendant company from so using, and inviting its passengers so to use, the passage, and from interfering with the plaintiff company's rights.

The plaintiffs alleged that the rights of way over the passage enjoyed by the adjoining owners and occupiers were such as were commonly incident to the use of a private passage at the rear of business premises, and that the passage had never been subject to any general right of way. By their defence the defendants claimed that they were entitled to a general right of way over the passage. They also alleged that the plaintiffs had wrongfully obstructed the passage by placing a fence across it and by placing packages and goods upon it, and counter-claimed for an injunction to restrain the plaintiffs from obstructing the passage.

At the trial the plaintiffs shewed a title to the soil of so much of the passage as abutted on to No. 1, West Street, but they did not establish any title to the soil of that part which abutted on to No. 28, Finsbury Pavement, and they did not claim to have more than a possessory title thereto. With the

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exception above stated the title to the soil of the passage was not proved.

The result of the evidence at the trial, other than that above set out with regard to the user of the passage, sufficiently appears from his Lordship's judgment.

P. O. Lawrence, K.C., and *Ashton Cross*, for the plaintiffs. There is no express grant of any right of way over the passage, and therefore rights of way over it must be implied from surrounding circumstances. Both the plaintiffs and the defendants claim under the codicil, and the question is whether the codicil by implication devised to the predecessors in title of the defendants a right of way over the passage abutting on to the property claimed by the plaintiffs for all purposes or only for purposes for which it was used when it was devised, that is, at the date when the codicil was made. By the mere devise nothing passed; all the right the defendants have is by user.

In cases of express grant the Court has simply to construe the grant, and the extent of the right of way is limited according to the construction of the grant itself: *Allan* v. *Gomme* (1); *Finch* v. *Great Western Ry. Co.* (2); *New Windsor Corporation* v. *Stovell* (3); but in cases of implied grant the extent of the right is always measured by user: *Wimbledon and Putney Commons Conservators* v. *Dixon* (4); *Williams* v. *James*. (5)

In this case there are two volunteers claiming under the same codicil. There is no way of necessity, and the case falls within the class of cases of contemporaneous grant. The law as regards implied grants is applicable to devises where the circumstances demand its application, and the extent of the right always depends on the state of things when the grant or devise is made. *Phillips* v. *Low* (6); *Pearson* v. *Spencer* (7); *Brown* v. *Alabaster* (8), which last case was an extension of the principle in *Pearson* v. *Spencer* (7), and is distinguishable from the present case. Both those cases were cited or referred to in *Roe* v.

(1) (1840) 11 Ad. & E. 759.
(2) (1879) 5 Ex. D. 254.
(3) (1884) 27 Ch. D. 665.
(4) 1 Ch. D. 362.
(5) (1867) L. R. 2 C. P. 577.
(6) [1892] 1 Ch. 47.
(7) 3 B. & S. 761.
(8) (1887) 37 Ch. D. 490.

Siddons (1) and *Taws* v. *Knowles* (2), but in the latter case the Court of Appeal did not deal with the question of an implied grant under the devise.

We submit that in the present case the only grant which the Court will imply is a grant for the purposes for which the passage was used at the date of the devise, and that would be very different from an express grant for all purposes. The defendants have only a limited right of way for certain purposes. They have altered the character of the dominant tenement, and that alteration has extinguished the easement: *Allan* v. *Gomme* (3); in which it was held that the grantee of a right of way was confined to the use of a way to a place which should be in the same predicament as it was at the time of the grant. In *Bayley* v. *Great Western Ry. Co.* (4), where the defendants had acquired under their statutory powers a stable, a right of way to which was held to have passed to them under the general words in their conveyance, the question whether the right continued when the property was converted was left open by the Court of Appeal. But we submit that, in the present case, there has been such a thorough and substantial change in the dominant tenement that the passage cannot properly be used as it is now being used by the defendants, because they are increasing the burden to the detriment of the servient tenement, and that the principle of the decision in *Wimbledon and Putney Commons Conservators* v. *Dixon* (5) applies. The dominant tenement has been so altered that the defendants cannot help exceeding the right if they use it at all, and the good user not being severable from the excess of user, the right is suspended.

Stewart-Smith, K.C., and *Stokes*, for the defendants. By the devise there is an implied grant of a right of way, and the measure of the grant must be determined at the death of the testator, the right being the same in extent as that which the owner of the dominant tenement has enjoyed: *Pearson* v. *Spencer* (6); *Barnes* v. *Loach* (7); *Watts* v. *Kelson* (8); *Brown* v. *Alabaster*. (9)

(1) (1888) 22 Q. B. D. 224.
(2) [1891] 2 Q. B. 564.
(3) 11 Ad. & E. 759.
(4) (1884) 26 Ch. D. 434.
(5) 1 Ch. D. 362.
(6) 3 B. & S. 761.
(7) (1879) 4 Q. B. D. 494.
(8) (1871) L. R. 6 Ch. 166.
(9) 37 Ch. D. 490.

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The defendants claim that they are entitled to a general unrestricted right of way for all purposes, or to such a right of way as the circumstances require. The testator demised No. 30 together with a general right of way over the passage, and then devised the same premises "with their appurtenances" to the defendants' predecessors in title, and we submit that on the determination of the lease the same right of way was enjoyed by the reversioners as was enjoyed by the lessee: *Barnes* v. *Loach* (1); *Bayley* v. *Great Western Ry. Co.* (2) The right of way was exactly defined by the lease.

Further, we submit that, independently of the word "appurtenances," this passage being a formed way leading to the back of the premises, and being a convenience for the enjoyment of the property, although not a way of necessity, a right of way over it passed by the devise to the defendants' predecessors in title: *Brown* v. *Alabaster* (3); and the lease of No. 30 is an indication of the extent of the right. Unless there is something in the circumstances which shews that the grantor of the implied grant intended to limit the generality of the way, then the right of way is general, or is such a right of way as the circumstances require.

It is said that there has been excessive user, but where an unrestricted right of way is given, it is not restricted to access to the land for purposes for which access would be required at the time of the grant: *Finch* v. *Great Western Ry. Co.* (4); *United Land Co.* v. *Great Eastern Ry. Co.* (5); *Newcomen* v. *Coulson.* (6) Those were cases of express grant, but it makes no difference whether the grant is express or implied so long as the right of way is general: *Cannon* v. *Villars.* (7) The word "assigns" in the lease includes licensees: *Baxendale* v. *North Lambeth Liberal and Radical Club.* (8)

There has been no excess of user, and the burden has not been increased by multiplying the number of persons using the passage if there is a right to use the way at all. There is no case which

(1) 4 Q. B. D. 494.
(2) 26 Ch. D. 434.
(3) 37 Ch. D. 490.
(4) 5 Ex. D. 254.
(5) (1875) L. R. 10 Ch. 586.
(6) (1877) 5 Ch. D. 133.
(7) (1878) 8 Ch. D. 415.
(8) [1902] 2 Ch. 427.

says that when the number of persons using the right of way has increased the right comes to an end. *Allan* v. *Gomme* (1) turned entirely on the words of the particular agreement. The usual cases of excess of user are cases like *Wimbledon and Putney Commons Conservators* v. *Dixon* (2) and *Williams* v. *James* (3), where the character of the dominant tenement is altered, causing an increase in the burden. Those cases are illustrations of the general rule. We submit, however, that this case is widely different. When once buildings used for trade purposes are on land in a city it is not possible to suppose that the grantor meant to limit his grant to the purposes for which the premises were then used. No clear-sighted man would so tie his property up. In 1812, Moorfields, the site of this property, were waste, and the testator must have foreseen to some extent at any rate the progress of London.

If there has been an excess of user it can be corrected by an injunction, and has not extinguished the easement.

This was a right of way for persons over the passage for business purposes from West Street to No. 30, and no mere increase in the number of persons can affect that right. The site is still being used for business purposes by the defendants, their business being that of carriers, and the passengers use the station for the purposes of business, the business of being carried. The user, therefore, is still within the right. The plaintiffs' contention that the right is totally gone cannot be supported, for the railway officers at any rate ought to be allowed to use the passage, and the defendants are entitled to bring materials for the repair of their station along it, and if a dwelling-house is erected over the station the tenants would be entitled to use the passage. Moreover, the evidence shews that the plaintiffs themselves have unreasonably exercised their rights, and are not entitled to an injunction.

We submit that on the evidence the defendants are entitled to an injunction on their counter-claim.

P. O. Lawrence, K.C., in reply. The user will be restricted to a reasonable use for the purposes of the land in the condition

(1) 11 Ad. & E. 759. (2) 1 Ch. D. 362.
(3) L. R. 2 C. P. 577.

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in which it was when the grant was made, that is, for the purposes of a private dwelling-house and a warehouse, and nothing else. It is said that the measure of the user is settled by the demise; if so, there has been excessive user: *Wood* v. *Saunders*. (1)

Cur. adv. vult.

July 17. KEKEWICH J. The property which is the subject-matter of this action passed by the will and codicil of John Lee to be presently mentioned. It would not be correct to say that he was the owner in fee of that property during the period embraced in the history of the case, but for all practical purposes he may be so treated. On a site acquired from the Corporation of London he had erected several houses, Nos. 28, 30, 32, 34, 36, and 38, Finsbury Pavement, and 1, West Street. All but the last were in a row fronting Finsbury Pavement, but No. 1, West Street, occupied a corner to the south-east front of West Street, and had no connection with Finsbury Pavement. For the convenience of these houses he had constructed on part of the same site a passage commencing in West Street, and running north and south at the back of all the houses in Finsbury Pavement except No. 38, which was built across the line of it, and these houses had openings into it. The passage ran by the side of No. 1, West Street, which also had a communication with it. So far as is known there never was any opening of this passage to the north. There can be no doubt that the passage was constructed for the convenience of these several houses, and so far as memory goes it has always been used in connection with them. The user has not merely in fact been different as regards the different houses, but this has been necessary from the form of the passage. At its commencement in West Street the passage was ten feet broad, but at a point which may be taken to be the corner of No. 30, Finsbury Pavement, it narrowed down to 6 ft. 6 in., and from another point, only a little further on, to the other end, the width was only five feet. The title to the soil of the passage has not been proved. The plaintiffs, who are the present owners of No. 28, Finsbury Pavement, and

(1) (1875) L. R. 10 Ch. 582.

No. 1, West Street, own the soil of so much of the passage as abuts on the latter house, but they have established no title to the soil of that part which abuts on No. 28, Finsbury Pavement, and they do not claim to have more than a possessory title thereto. About the title to the soil of the rest of the passage there is no admission or evidence. But in my view the absence of title to the soil of the passage is immaterial, and the questions to be decided do not in anywise depend thereon, or at any rate can be decided independently of it.

John Lee does not appear to have been in personal occupation of any of the houses. Except as regards No. 30, Finsbury Pavement, there is nothing to shew whether they were occupied by tenants under leases or otherwise. Each house is described in John Lee's will as being in the occupation of some person there named, but there is no further information. No. 30, however, was demised by a lease of January 18, 1821, to John Ede and John Bond for a long term, which expired at Michaelmas, 1899, and this lease, as will presently appear, has been treated as an important factor in the case. The devise of this property by John Lee was made by a codicil which disposed of it in many different parcels, each of which was thereby settled in a different manner. There is no occasion to go into those limitations. Suffice it to say that the plaintiffs claim No. 28, Finsbury Pavement, and No. 1, West Street, under one set of limitations, and that the defendants' predecessors in title claimed No. 30 and No. 32, Finsbury Pavement, under other limitations.

The first question is whether the several devisees had rights of way over the passage. None are expressly given, but it is said that rights must be implied from the surrounding circumstances, and I entertain no doubt that this contention is sound. If this were a case of grant instead of devise, rights of way would necessarily be implied, and there is ample authority for the proposition that the settled law as regards implied grants is applicable to devises where the circumstances demand its application. I might well be content to rest this on the statement of the broad principle by Chitty J. in *Phillips* v. *Low* (1), but it is useful also to quote *Pearson* v. *Spencer*. (2) In delivering

(1) [1892] 1 Ch. 47, 51. (2) 3 B. & S. 761, 767.

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the judgment of the Court that a right of way passed with the devise there in question Erle C.J. says: "It falls under that class of implied grants where there is no necessity for the right claimed, but where the tenement is so constructed as that parts of it involve a *necessary dependance*, in order to its enjoyment in the state it is in when devised, upon the adjoining tenement." Bearing in mind that the passage with which we are dealing had been constructed for the convenience of these houses, there seems to be here the "necessary dependance" of which the Chief Justice speaks, and that is not at all affected by the fact that the houses had front entrances to Finsbury Pavement. What rights ought to be implied is another question, but that some right of way to and from West Street ought to be implied is to my mind perfectly clear. The fact that the other houses may at the time have been let on lease, and that No. 30 certainly was let on lease for a long term makes no difference: see *Barnes* v. *Loach*. (1)

The next question is what rights ought to be implied, and this presents considerable difficulty. The construction of an express grant of a right of way must be governed by the language of the grant, and the Court cannot stop short of or go beyond the proper legal meaning and effect of that language, but a different rule applies to the construction of an implied grant. There the user of the right is the only satisfactory guide. In *Williams* v. *James* (2) this is distinctly laid down in the judgments of Bovill C.J. and Willes J., and in *New Windsor Corporation* v. *Stovell* (3) North J. states the rule neatly thus: "In the case of an easement by usage where you have to measure the extent of the easement, not by the terms of any deed, as the deed is ex hypothesi lost, but simply from what has been done, there is no way of ascertaining the extent of the easement except from what has been done."

It was urged on behalf of the defendants that the express grant contained in the lease of January 18, 1821, must be taken to be the measure of the implied grant under the devise. This seemed to me wholly untenable; but no more need be said about it, because ultimately the argument took the more

(1) 4 Q. B. D. 494. (2) L. R. 2 C. P. 577.
(3) 27 Ch. D. 665, 672.

moderate and unobjectionable form that the express grant by the lease must be regarded as a factor in the determination of the question what ought to be implied. I proceed to consider the lease from that point of view. It is a lease of No. 30, Finsbury Pavement, which is described as a piece or parcel of ground together with the messuage or tenement and warehouse behind the same, and this property is demised "Together with free liberty of ingress egress and regress way and passage to and for the said John Ede and John Bond their executors administrators and assigns and their and every of their servants workmen and others from time to time at all reasonable hours during the term hereinafter mentioned into from and out of the back part or rear of the premises hereby demised by through over and along a gateway or passage leading therefrom into the aforesaid new street. Nevertheless in common with the tenants and occupiers of all and every other the messuages or tenements adjoining or contiguous to the same gateway or passage and communicating therewith." These are words of large import, and can be properly construed only as passing a general right of way. Nevertheless, even a general right of way must have some limits, and one is found in the physical character of the passage which, being no more than ten feet wide, could not be used for carriages of greater width or by a carriage of that width and foot passengers at the same time. Whether a further limit can properly be found in the character of the property in connection with which a right was granted, that is, whether such right ought to be limited to uses connected with a dwelling-house and warehouse or not, there is no occasion to determine, for the lease having expired there can be now no claim under this express grant. There is little or no evidence of the character and structure of the other houses in Finsbury Pavement except No. 28, and such evidence as there is points to the houses beyond No. 32, that is, Nos. 34 and 36, having been less of a business character, but for the purpose in hand it is convenient and not unreasonable to infer that all were of a character similar to that of No. 30, and that each contained some room or rooms which might properly be described as or classed with a warehouse so that the grant of a right of way in connection with these houses may be taken to

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have contemplated such user as would be required for business as well as domestic purposes. There is a passage in the judgment of Sir George Jessel in *Cannon* v. *Villars* (1) which, though there applied to entirely different facts, seems to me exactly to express the problem here presented for solution. He says: "It must be assumed that the grant of the right of way was intended to be effectual for the purpose for which the place was designed to be used, or was actually used." There are instructive statements agreeable to this in the judgment of Lord Denman in *Allan* v. *Gomme* (2), to which I do not intend again to refer, though it is pertinent to other points of this case. *Wood* v. *Saunders* (3) was decided on the same lines.

There is nothing more to be said about the purpose for which this passage was designed to be used, and there is no evidence to shew for what purpose it was actually used at or immediately after the date of the grant, which may be taken to have been either the date of the codicil, December 6, 1828, for which there is some authority, or the date of the testator's death, June 20, 1832, the difference in dates being in this case wholly immaterial. But there is a considerable body of evidence shewing how the passage was used in later years, and although, of course, the user may have varied, and probably did vary according to changes in the occupation of the houses and in the business carried on by the respective occupiers thereof, yet I think that the later user regarded as a whole may safely be treated as an indication of what the user was from the date of the grant and onwards.

About the user of the passage by the occupiers of No. 1, West Street, there is really no information; but about the user of it by the occupiers of No. 28, Finsbury Pavement, we know a great deal. The predecessors of the plaintiffs were trimming manufacturers, and in connection with their business they frequently and regularly had goods delivered at and taken away from an opening in the passage where there is what is called a loading dock. These trimming manufacturers had no vans of their own, and the goods were delivered and taken away by vans sent by railway companies. I conclude from the evidence that

(1) 8 Ch. D. 415, 420. (2) 11 Ad. & E. 759.
(3) L. R. 10 Ch. 582.

these deliveries and despatches were not so regular in point of time as those of the plaintiffs, and by reason of the goods not being either so bulky or so heavy as those of the plaintiffs they did not obstruct the passage for so long together, though the total time occupied in a day was considerable. Also I infer that the obstruction was not so complete as it is now.

The plaintiffs, ever since they succeeded to No. 28, Finsbury Pavement, about thirty-two years ago, have continued to use the passage in like manner. There seems to have been some structural alterations of the premises not requiring further notice, but the main difference between the operations of the plaintiffs and those of their predecessors consists in the fact that the plaintiffs' heavy goods cannot be loaded or unloaded without the provision of staging, which is constructed of planks and empty packages so arranged as to admit of the goods passing between the loading dock and the vans, being generally the plaintiffs' own vans, and of a character suitable to this particular traffic. There can be no doubt on the evidence that when one of these vans has been backed up the passage so as to be available at the loading dock and the necessary staging has been arranged, it is practically impossible for anyone to pass. Some persons do occasionally pass, but they have to cross the staging some two feet high, and it is obvious that this cannot be done without inconvenience to those engaged in loading or unloading the van, which involves delay in the work, and further that there is some risk of accident. I have already said that probably the plaintiffs use the passage for these purposes more than their predecessors did, and that this is due to more than one cause, including the increase of the plaintiffs' business, but the user has been of the same character as that of their predecessors, and it seems to me to be the user for which the passage may fairly be said to have been designed.

There was a suggestion at a late stage of the trial that the plaintiffs have exercised their rights unreasonably. Nothing of the kind is pleaded, and I do not think that the suggestion is supported by the evidence.

The passage was at one time used by the occupiers of No. 30 in a similar manner. Messrs. Herring were paper manufacturers,

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and they also had goods delivered by means of a van backed up the passage. There is evidence to shew that they sometimes were delayed in their use of the passage for this purpose by the presence of a van at the loading dock of No. 28, and that, on the other hand, the occupiers of No. 28 had sometimes to wait until Messrs. Herring's van was out of the way. This was the natural consequence of similar rights attaching to two houses, and being used in a similar manner, and notwithstanding that disputes occurred it is probable that neither one nor the other really suffered any inconvenience of which complaint could be made.

There was no user of so obstructive a character by the occupiers of any of the other houses, but we have evidence that a wine merchant who occupied one of them (which, I am not certain) had his goods delivered on a barrow, and that was user quite similar in character to that already mentioned. There is no more evidence of user for business purposes. As an approach on foot to the back entrances of the houses the passage does not seem to have been much used, but I think that it must be taken to have been used as much as the convenience of the occupiers required. It was the practice to take out house refuse by means of this passage, the dustbins being carried down the passage and emptied into a cart standing in West Street. Beyond what has been thus summarized nothing really is known about the user of the passage, and unless the wine merchant occupied one of them, nothing at all is known about the user in connection with the houses at the northern end; but it may reasonably be assumed that the user in connection with these houses was on the same lines as that in connection with the other houses, modified, of course, by the narrower width of the passage, and possibly by the construction of the houses themselves. As regards No. 30, no doubt during the currency of the lease the user depended upon the express grant, and the user throughout seems to have been of the same character.

The practical conclusion is that, whether under the express grant or under that implied from the devise, the user of the passage has been according to the purpose for which it was designed. This is confirmed by what we know about the closing

of the passage at the southern end. There were gates there with a padlock, and these gates were, it seems, kept locked during the night when the passage was not required and there might have been inconvenience in leaving it unguarded, and were kept open during the working day. We know of three keys of these gates. One was kept by Messrs. Herring when occupying No. 30, one by a doctor who for a while occupied No. 34 or 36, and the third by the occupiers of No. 28, Finsbury Pavement, who, of late years at any rate, seem to have undertaken the duty of locking and unlocking the gates night and morning. There was not likely to be—and except for a dispute between the plaintiffs and Messrs. Herring, settled by an agreement to be presently mentioned, there apparently was not—any difficulty in the occupiers of the other houses having the gates opened if and when they required to use the passage.

What has now happened is this. The defendants have acquired the site of the two houses, Nos. 30 and 32, Finsbury Pavement; they have pulled down those houses, and constructed in their place a railway station, which probably contains some rooms with fireplaces and offices, not, I suppose, sleeping accommodation, but is mainly devoted to the ordinary purposes of a railway station—that is, the passage to and fro of travellers by the railway. There seems to be no provision for the transit of personal luggage or goods. At all times of the day, and especially in the morning and again in the evening, a large number of these travellers desire to go through the passage into or from West Street. If the plaintiffs are entitled to use the passage as they have hitherto done, these travellers, as already mentioned, cannot use it without inconvenience to themselves, but, beyond this, if they attempt to use it they must necessarily impede the work of the plaintiffs in loading or unloading vans. Therefore, apart from any question of ownership of the soil, the plaintiffs are immediately interested in the determination of the question whether this new user of the passage is right or not. In this connection there must not pass unnoticed the interference by the defendants with the before prevailing arrangement respecting the gates at the south end of the passage. The defendants have insisted on unlocking, and keeping unlocked, those gates at times

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when they were before closed. Assuming them to have been the successors for all purposes to the previous tenants of No. 30, Finsbury Pavement, I do not think that this action of theirs could be treated as an unreasonable exercise of their rights, but it points to a more extended user of the passage than was formerly known. The regulation of the gates was for a time governed by the agreement of December 31, 1874, which I mention only to shew that it has not been forgotten, for it is of little use in determining the rights of the parties in this case. It was obviously framed to settle disputes between neighbours, the occupiers for the time being of Nos. 28 and 30 respectively, and cannot be regarded as concluding any question of right about closing the gates or otherwise. It does not purport to bind other persons not parties to the agreement, and the rights of such other persons cannot be affected thereby.

The plaintiffs say that the passage cannot properly be used as it is now used by, or by the licence or invitation of, the defendants. They disclaim any contention that whatever rights formerly attached to Nos. 30 and 32, Finsbury Pavement, have been abandoned. They found their complaint on the principle that a right of way or other easement cannot be properly exercised by the dominant tenement so as to increase the burden originally cast on the servient tenement, and to the detriment of the latter. For this principle, which could only be applied in favour of owners of the soil, there is authority to be found in decided cases and text-books; but, passing that by, I prefer to take as my guide the language of James L.J. in *Wimbledon and Putney Commons Conservators* v. *Dixon*. (1) He says: "I am satisfied that the true principle is the principle laid down in these cases, that you cannot from evidence of user of a privilege connected with the enjoyment of property in its original state, infer a right to use it, into whatsoever form or for whatever purpose that property may be changed, that is to say, if a right of way to a field be proved by evidence of user, however general, for whatever purpose, qua field, the person who is the owner of that field cannot from that say, I have a right to turn that field into a manufactory, or into a town, and then use the way for the purposes

(1) 1 Ch. D. 362, 368.

of the manufactory or town so built." Assuming this to be a sound enunciation of the law, the question is whether the principle can properly be applied here for the protection of the plaintiffs. A similar question was mooted in *Bayley* v. *Great Western Ry. Co.* (1), but did not call for decision. It is urged on behalf of the defendants that the site of the two houses is still being used for business purposes, and that as the implied grant extended to business purposes the present user is within it. The answer, to my mind, is that not only was the erection of a railway not contemplated by the grantor, but it could not possibly have been within his contemplation, and a railway station is not merely in its construction, but in its mode of occupation, something entirely different from any dwelling-house, warehouse, or even manufactory, which could have been erected on the land. If the owner of these two houses had thought fit to erect an attractive monument on this site, or to convert it into a place of public recreation, could it be contended that those who resorted to it were entitled to use the passage for ingress, egress, or regress? It seems to me that such a contention would have been wholly untenable, and I fail to discover any substantial difference between this hypothetical user and that which the defendants support. It may be correct to say that the right is suspended, for I suppose it is presumably capable of being revived, but what I hold is that it is not under present circumstances exercisable at all.

An attempt was made to distinguish between what may be styled the public purposes of a railway station, that is, the coming to and fro of travellers by the railway, and the private purposes which must necessarily be incidental to any such building. It is said that the railway officers, at any rate, ought to be allowed to use the passage, and further, that from time to time materials for employment in the station in repairs or otherwise may properly be brought through the passage in exercise of the old right of way. Further, it was suggested that a dwelling-house might hereafter be erected over the station, and that the occupiers of that dwelling-house would be entitled to use the passage. I do not say that they would not, but I need not entertain any such question as that; and, as regards the railway officers and

(1) 26 Ch. D. 434.

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the carriage of materials, it seems to me that the defendants, having made it impossible that the passage shall be used for the purposes for which it was designed and for which it has in fact been used, cannot be heard to say that any such distinction as they put forward ought to be made in their favour. There is some evidence that the station is itself used as a passage, and that persons so using it also use the passage in question. The circumstances render it likely that this user has been, or will prove in the future to be, greater than the evidence warrants; but I deem it unnecessary to go further into that question, or to consider whether the defendants are in any wise responsible for this additional user, because the injunction which I propose to grant will probably obviate any objection under this head.

There is also evidence to shew that the plaintiffs have themselves been trespassers on the passage. I have already stated that in employing empty packages for staging they were not unreasonably using the passage. But it seems to me that they have occasionally, and perhaps frequently, left packages lying about merely for their own convenience when not required to be used for staging, and have even done this in parts of the passage beyond their own premises. It may be that these packages lying about have sometimes reduced the free area of the passage so much as to interfere with those entitled to use it. Treating this evidence as strong against the plaintiffs, yet it seems that any persons interfered with have been the railway travellers, who, according to my view, have no right to be in the passage at all, and the defendants, being in my judgment not entitled to use the passage, cannot maintain an action in respect of such interference.

The defendants also complain that the plaintiffs have obstructed the passage by the erection of a partition and door across it at the extreme corner of their own premises. There is no doubt that they did this with the view of preventing access to their part of the passage by persons coming from the railway station, and that it remained there for about a fortnight, at the expiration of which it was pulled down by the defendants. On the question whether the door was locked or not the evidence is doubtful, but I infer that it was intended to be locked. There has been no

attempt to restore it, and the plaintiffs disclaim any intention to do that, but it was erected in assertion of a right, and the question of threat or intention to restore it does not arise. It was a wrongful act on the part of the plaintiffs, but not as against the defendants, they having, in my view, no rights at all over the passage. As regards this obstruction also they cannot maintain an action.

In the course of a long and interesting argument many points were raised, and many authorities cited which, determining to dispose of the case on the lines above stated, I have thought it unnecessary particularly to mention. The relief to which I hold the plaintiffs entitled according to the conclusion arrived at is: An injunction to restrain the defendants, their servants and agents, from passing, and from licensing or inviting any persons using their railway station as travellers by the railway or otherwise to pass, either to or from West Street along the passage in the pleadings mentioned. The defendants ought not further to interfere with the locking or unlocking of the gates into West Street, but I take it that in view of such an injunction this will cease to be of practical importance, and no provision need be made respecting it.

The defendants must pay the costs of the action, and there will be judgment on the counter-claim for the original plaintiffs with costs.

R. M.

The defendants appealed.

1906. Nov. 22. After the appeal had been opened, the parties agreed upon an order to the following effect: Discharge the judgment so far as the same directs that the defendants, their servants and agents, be perpetually restrained from passing, and from licensing or inviting any person using their railway station as travellers by the railway or otherwise to pass, either to or from West Street in the pleadings mentioned along the passage in the pleadings also mentioned; and in lieu thereof order that the defendants, their servants and agents, be perpetually restrained from licensing or inviting any persons using or intending to use their railway station as travellers by the railway or otherwise to

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pass either to or from West Street in the pleadings mentioned along the passage in the pleadings also mentioned; but this order is not to preclude the defendants from using the passage for the purpose of access by passing to or from their station by their officers, clerks or servants, or by any person (not being a traveller or intending traveller) reasonably using the same for the purpose of delivering or removing by carts or otherwise goods or material not to be carried by the railway or for the purpose of communicating with the officers, clerks or servants of the defendants; provided that the defendants shall ensure that the access from the said passage to the said station shall be kept closed to travellers or intending travellers by the defendant railway; and, in case the defendants shall hereafter erect flats or other buildings above their station, nothing in this order is to prejudice either party upon the question whether the defendants are entitled to use the passage for access thereto; and order that with this variation the said judgment dated the 17th of July, 1906, be affirmed.

Solicitors: *W. A. S. Hellyar & Co.; Le Brasseur & Oakley.*

H. B. H.

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Oct. 30, 31; *Nov.* 7.

In re WRIGHT. MOTT *v.* ISSOTT.

[1906 W. 1666.]

Will — Construction — Bequest on Conditions — Forfeiture — "Residence" — "Unmarried."

By his will a testator gave his leasehold house, No. 33, Turner Road, Lee, to his trustees, upon trust to permit his niece C. to hold and occupy the same free of rent, but subject to a proviso thereinafter mentioned, "and to her residing upon the said premises during her lifetime." In a subsequent part of the will the testator directed that the use and occupation of the house aforesaid were given by him upon the express condition that after his decease C. should "remain single and unmarried," and in the event of her marrying she was to forfeit the bequest, and it was to fall into the residue.

C. resided in the house until her marriage and for some ten years afterwards, and then her husband took another house in the neighbourhood, and she moved into it with him. She let all the rooms but one at No. 33, Turner Road, to a weekly tenant, and in this reserved room she kept a bed always ready for use, her books, some clothes, writing materials, &c., and she retained the key of this room and also one of the outside door of the house. She went there two or three times a week, and occasionally had meals and slept there:—

Held, that "residing" meant "personally residing," and that what C. had done at No. 33, Turner Road, did not amount to residing within the meaning of the will:—

But *held*, also, that, reading the subsequent void condition in restraint of marriage into the condition as to residence for the purpose of construing the will, the words "residing during her lifetime" must mean during her lifetime while she was capable of residing, namely, as a spinster; and therefore, upon her marriage, the condition as to residence did not apply, and there was no forfeiture.

Adjourned Summons.

By his will dated September 16, 1889, the testator, Henry Richard Wright, appointed the plaintiffs his trustees and executors, and after certain pecuniary and specific legacies, gave a freehold messuage, No. 26, Turner Road, Lee, to his trustees upon trust to permit and suffer one Caroline Rogers to hold and occupy the same during her lifetime free from all payments for rent, and subject to her "personally residing" in the said

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messuage during her lifetime; and the will contained another bequest as follows: "I give and devise unto my trustees all that my leasehold house and premises situate No. 33, Turner Road, Lee, aforesaid to hold to them my said trustees, their executors, administrators, and assigns, upon trust to permit and suffer Clara Elizabeth Couldrey" (now the defendant C. E. Issott) "to hold and occupy the same during her lifetime, free from all payments in respect of rent, rates, taxes, insurance, and repairs, but subject to the proviso and condition hereinafter mentioned, and to her residing upon the said premises during her lifetime"; and after her decease the testator directed that the said leasehold house should be sold and the proceeds distributed among his residuary legatees thereinafter mentioned. In a subsequent part of his will the testator provided as follows: "I hereby further direct and declare that . . . . the use and occupation of the house, No. 33, Turner Road aforesaid, rent free . . . . are given by me upon the express condition that after my decease she remain single and unmarried, and that in the event of her contracting marriage she forfeit the bequest and other benefits made to her under this my will, and that the same fall into my residuary estate." The testator died on April 7, 1890. Clara Elizabeth Couldrey, who was a niece of the testator, entered into possession of No. 33, Turner Road. She married William Issott on March 21, 1894, and lived there with him until 1904, when he took a house in the neighbourhood, No. 7, Eltham Road, Lee, and she lived there with him. According to Mrs. Issott's evidence she let all the rooms but one at No. 33, Turner Road, to a weekly tenant, but, by arrangement, she reserved the use of the dining-room and kitchen, and she retained a key of the reserved room, and also one of the front door of the house. The reserved room contained a bed always kept ready for use, and was used as a sitting-room where she kept writing materials, some books and clothes, &c. She went there two or three times a week, and occasionally had her meals and slept there. It was also her only postal address. The rent, rates, taxes, &c., of this house were from time to time paid by the trustees out of the residuary estate of the testator. They now took out an originating summons to have it determined whether the defendant C. E.

Issott had continued to reside, or was now residing, upon the leasehold premises within the meaning of the will, and whether they were justified in continuing to pay the rent, rates and taxes out of the residuary estate, and in permitting C. E. Issott to hold and occupy the same premises.

R. M. Pattisson, for the trustees of the will.

P. O. Lawrence, K.C., and *J. W. Manning*, for the defendant C. E. Issott. The gift is in terrorem, ineffectual, and against public policy. The language used by the testator in the case of the first bequest of a house to Caroline Rogers is different, as it is on condition of her "personally" residing. The word "personally" is omitted in the bequest to Clara Elizabeth Couldrey.

[KEKEWICH J. Having regard to *Walcot* v. *Botfield* (1), residence must be personal.]

Most of the cases on residence have been cases where a certain period of residence has been fixed by a testator, but in *Fillingham* v. *Bromley* (2) no period was mentioned, and the words were "live and reside." Unless there is a very clear direction the Court will not enforce a forfeiture clause such as this: *Clavering* v. *Ellison* (3); *Walcot* v. *Botfield*. (1)

The condition here is in general terms, and too vague and uncertain to operate as a forfeiture. And further, in the events which have happened, the condition has become absolutely immaterial, as the condition as to residence must be held to apply only whilst the lady was unmarried. The testator does not contemplate her ceasing to reside being married, because on marriage he intended the gift to be forfeited. It is clear that the condition in restraint of marriage is void: *Morley* v. *Rennoldson*. (4) But the two conditions must be read together for the purpose of construing the will. She is to reside during her lifetime and unmarried. Therefore the will must be read as enforcing a condition as to her ceasing to reside in the house before marriage, and it does not apply after marriage. But even if the Court should be against that construction, upon

(1) (1854) Kay, 534.
(2) (1823) T. & R. 530.
(3) (1859) 7 H. L. C. 707.
(4) [1895] 1 Ch. 449.

KEKEWICH J. 1906 WRIGHT, *In re.* MOTT *v.* ISSOTT.

the question of fact, she has not ceased to reside. The words as to residence cannot mean that she is to live there every day; and where is the line to be drawn? A man may well have two residences, and he cannot sleep in both. In this will there is nothing about exclusive occupation of the house, and Mrs. Issott does many of the things which, according to the definition of Bacon V.-C. in *In re Moir* (1), constitute a residence. She has made it her second home. On the whole case, therefore, the condition has not been broken, up to the present time, and there has been no forfeiture.

B. A. Hall, for those interested in the residue. There is no intention here that the condition should be in terrorem. Such gifts have been held to be against public policy, but there is no such case here. The testator really meant to provide a home for this lady while she had none. The house in question was to be kept up for her while she was unmarried, and if she married and did not want a home it was to go to the residuary legatees. The condition as to residence is good: *In re Trenchard* (2); and has not been complied with. Mrs. Issott has not personally resided there, and residing means "personally residing." There has therefore been a forfeiture: *Walcot* v. *Botfield*. (3)

In both the cases referred to, of *Walcot* v. *Botfield* (3) and *In re Moir* (1), there were large residences to be kept up and occupied as family residences, but it is impossible to have two suburban residences in a case like this. She cannot reside in both. The question is, Can this house be really called her home? Her real home is at 7, Eltham Road, with her husband. As to the contention that the condition is too vague and uncertain, the terms are sufficiently distinct within the authorities: *Maclaren* v. *Stainton* (4); *Dunne* v. *Dunne* (5); *Wynne* v. *Fletcher*. (6)

With regard to the construction of the will, and writing in the words of the condition after mentioned, there is no reason why "or" should be turned into "and." There are two separate conditions, and if she marries or if she ceases to reside, whichever event first happens, there is to be a forfeiture of the

(1) (1884) 25 Ch. D. 605.
(2) [1902] 1 Ch. 378.
(3) Kay, 534.
(4) (1858) 27 L. J. (Ch.) 442.
(5) (1855) 7 D. M. & G. 207.
(6) (1857) 24 Beav. 430.

bequest. *Morley* v. *Rennoldson* (1) was a very special case, and depended upon the construction of a will and codicil under a peculiar state of circumstances. Here the testator intended that when the lady had another house, whether married or not, then the gift was to cease. That intention the Court can give effect to, and there has consequently been a forfeiture.

KEKEWICH J., after making some general remarks upon the character of the will, continued:—I have come to a conclusion upon the construction of this will which is satisfactory to my mind, but I confess that there is ample room for a different conclusion. In the first place, I will take this will and read it as if there was only the trust to suffer the lady to hold and occupy this house on condition of her residing in the said messuage during her lifetime. The lady occupied this house for some time as her natural home, and there married, and after some years, her husband having taken another house, she followed him there. What she has done with No. 33, Turner Road, is to let all the rooms but one; there was some rather vague arrangement that she might use the drawing-room or dining-room and the kitchen; she can go in and out as she pleases, and she has the key of the front door. The room which she retained and called "her den," and of which she has the key, is one in which she keeps her writing materials, some clothes and certain trifles, and there is a bed which she always keeps ready for use. She goes there about two or three times a week, and occasionally has meals and sleeps there. Can that be said to be residence? I have read with great interest the judgment of Wood V.-C. in the case of *Walcot* v. *Botfield* (2), and there are many passages in it which are worth attention with reference to this particular case, and especially one in which he says that residence must be personal, and is connected with the personal enjoyment by the person who is to reside. That deprives of any value the reference made by counsel for Mrs. Issott that there was a difference in the words of the gift in the will of a house to Caroline Rogers, as it was to be subject to her "personally residing" there, whereas it is not so in the case of Mrs.

(1) [1895] 1 Ch. 449. (2) Kay, 534.

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Issott. But personally residing and residing are the same thing.

There was another case before Bacon V.-C. of *In re Moir* (1), where he deals with the same subject, and though his remarks deserve every consideration, as a master of the English language, yet when he comes to define what residence is, they fall very far short of a definition and afford me very little guidance. Nor do I think it necessary to go into any other authorities, or to consider what the word may mean with reference to different people under different circumstances. No doubt a man or a woman may have two residences under certain circumstances. Here I have to consider this particular will, and, reading it in the way which I have put it, what is the meaning there of personally residing in the house? Although I am unwilling to deprive this lady of this house without urgent cause, I cannot bring myself to think that what she has been doing is "residing" in the house. It seems to me that she has been using it for a place of rest and amusement, and not for a residence. I cannot say that she is at home there, though she receives certain business letters and conducts some other correspondence there. Her husband's house is really, of course, her home, and I cannot say that she makes the house in question her home as the testator intended it to be. If, therefore, I was bound to decide the case on this ground, I should have to hold that she did not reside there within the meaning of the will, and there would have been a forfeiture under the condition.

But I have come to a conclusion in favour of the lady upon the construction of the whole will. It is a very difficult will to construe, and it contains a condition which I have up to the present moment omitted. The testator gives the trustees his house upon trust to allow the lady to hold and occupy it during her lifetime, but subject to the proviso or condition thereinafter mentioned and to her residing upon the premises during her lifetime. In order to construe that clause I must bring in the condition thereinafter mentioned, and I cannot construe the whole clause without reading in the words of that express condition which are to be found two pages further on in the will, and they are that "after my decease she remain single and

(1) 25 Ch. D. 605.

unmarried"; and there is a gift over in the event of her contracting marriage. I therefore read the whole clause thus: "Subject to the proviso and condition that she remain single and unmarried, and subject to her residing upon the said premises during her lifetime." It matters not, for the present purpose—that is, for the purpose of construction—that the condition about remaining single and unmarried is bad in law. What does the testator mean? To construe it literally is to make it absolute nonsense. He cannot mean that she is to have it on the condition of her remaining single and unmarried, but if she marries she is still to have residence there during her lifetime. The two positions are inconsistent. In the second condition he is contemplating her living there single and unmarried during her life. It is said that I might read the two conditions independently of one another, thus—subject to the condition that she is to remain there single and unmarried, and continues to reside there, and that it is to go over on her marriage or ceasing to reside, whichever first happens. That is a possible construction, but I do not think you can get quite at the conclusion which would justify reading the will in that way. By the words "during her lifetime," I think the testator must have intended to mean during her lifetime while she is capable of residing, not during her lifetime when she cannot reside there, because according to his directions she would have forfeited her interest. I cannot, on reflection, give any other sense to the words than that they are to be read "during her lifetime as a spinster," and I must restrict the meaning in that way. The result is that after her marriage the condition as to residence does not apply, and there has been no forfeiture.

Solicitors: *Claremont & Haynes; Newton, Lewin & Levett.*

G. M.

SWINFEN EADY J.

1907

Jan. 12, 15.

In re BAKER AND SELMON'S CONTRACT.

[1906 B. 3824.]

Vendor and Purchaser—Contract—Title—Vendor selling as Trustee—Legal Estate in Vendor—No Power of Sale—Written request of Beneficiaries before Contract.

A contract for sale of a freehold house—lot 1—provided that "The vendor of lots 1 and 2 who is the trustee under the will of the said James Baker deceased is selling the said properties under the trusts and powers vested in him thereunder and shall not be required to enter into any covenant other than that implied by his conveying in such capacity as aforesaid."

It also provided that "The tenant for life of lot 1 will join in the conveyance to the purchaser for the purpose of releasing her life interest therein."

On the examination of title it appeared that the vendor had the entire legal estate as trustee of the will, but had no power or trust for sale thereunder. He had, however, entered into the contract at the written request of the life tenant and all the other beneficiaries, including himself, so that he could compel them to join :—

Held, that the vendor had shewn a good title in accordance with the contract.

In re Bryant and Barningham's Contract, (1890) 44 Ch. D. 218, and *In re Head's Trustees and Macdonald*, (1890) 45 Ch. D. 310, distinguished.

VENDOR AND PURCHASER SUMMONS.

Under and by virtue of the will of James Baker, who died on April 9, 1906, and in the events that had happened, a freehold house was vested in the vendor, the testator's son John Chapman Baker, as trustee of the will upon trust to permit the testator's widow to have the use and enjoyment thereof, or to pay her the rents thereof during widowhood, and after her death or remarriage in trust for the vendor and the nine other children of the testator in equal shares as tenants in common. The vendor, in whom the entire legal estate was vested by the will, had no present or future power or trust for sale thereunder.

By an instrument in writing dated April 16, 1906, the widow and the ten children, all of whom were of age, authorized and requested the vendor to sell the said house, and agreed that the proceeds of sale should be held upon trust for investment in

investments authorized by the said will, and that the income of those investments should be paid to the widow during her widowhood, and upon her death or remarriage the investments should be realized and the proceeds divided equally between the ten children.

Two of the children were married women.

On June 12, 1906, the vendor, in pursuance of this authority, sold the property—lot 1—by auction for 770*l.*

The particulars of sale stated that lots 1 and 2 were sold on behalf of John Chapman Baker "as trustee under the will of James Baker deceased," and that "The tenant for life of lot 1 will join in the conveyance to the purchaser for the purpose of releasing her life interest therein."

The special conditions provided that—

"6. The title shall commence as follows: As to lot 1 with a conveyance dated the 13th day of May, 1876, and made between Fanny Amelia Snell of the one part and James Baker of the other part . . . ."

"7. The vendor of lots 1 and 2 who is the trustee under the will of the said James Baker deceased is selling the said properties under the trusts and powers vested in him thereunder and shall not be required to enter into any covenant other than that implied by his conveying in such capacity as aforesaid."

The purchaser having taken the objection that the vendor had no power or trust for sale, the vendor produced the written request and offered to join all the beneficiaries. The purchaser pointed out that this was not the title offered by the contract, and insisted that if the vendor (as trustee), with the concurrence of the life tenant, was unable to make a good title, the deposit must be returned.

The vendor and the beneficiaries issued this summons for a declaration that the purchaser's requisitions and objections had been sufficiently answered, and that a good title had been shewn in accordance with the particulars and conditions.

J. G. Wood, for the vendor and beneficiaries. The vendor having the legal estate as trustee of the will, and having entered into the contract at the written request of all the

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beneficiaries so that he could compel them to carry it out and concur in the conveyance, had the title completely in his hands at the date of the contract. He has therefore shewn a good title according to the contract: *Forrer* v. *Nash.* (1) The case differs toto cœlo from cases where the vendor has no title at the date of the contract, but seeks to get one subsequently. Here he had the same title throughout. In *In re Bryant and Barningham's Contract* (2) there was no such previous written request, so that the trustee vendors could not have compelled the life tenant to convey under the Settled Land Acts, and a good title was therefore not shewn. In *In re Head's Trustees and Macdonald* (3) the purchaser repudiated the contract as soon as it was discovered that the trustee vendors had no power of sale. The vendors then offered to procure the concurrence of the beneficiaries who were not bound to concur. This was too late, and the contract could not be enforced. Cotton L.J. seems to have considered that the title of the beneficiaries could not in any case have been forced on the purchaser, as it would have been a different title from that offered by the contract, but Fry L.J. thought that, if their concurrence had been obtained at an earlier stage of the proceedings, it was by no means clear that the contract could not have been enforced. The point was, however, left open. In the present case the beneficiaries were bound to concur at the date of the contract made at their request. They were really undisclosed principals, who were bound by and entitled to enforce the contract: Fry on Specific Performance, 4th ed. p. 108; and they have therefore been made parties to the summons.

Edward Ford, for the purchaser. The vendor and beneficiaries can very likely make a good title, but it will not be the title offered by the contract. The 7th condition clearly implies that the vendor is selling under a power or trust for sale.

[SWINFEN EADY J. It must be read with the provision that the life tenant will join to release her life interest.]

That at most implies that the power does not extend to the life interest. Whether it points to a future power expressly capable of acceleration by surrender of the life interest, or to a

(1) (1865) 35 Beav. 167. (2) 44 Ch. D. 218.
(3) 45 Ch. D. 310, 315, 317.

present power to sell the reversion subject to the life interest, is immaterial. It certainly does not imply that the vendor has no power or trust for sale at all. The vendor cannot make a title in accordance with the contract.

[SWINFEN EADY J. The vendor has the legal estate. He has sold at the written request of all the beneficiaries, and can therefore compel them to join.]

That is not the title offered by the contract, but the beneficial title. It would involve the investigation of the title of the ten children, two of whom are married women. There might be questions of assignments, incumbrances, settlements and death duties, all of which would be avoided if the title were made under a power or trust for sale.

[SWINFEN EADY J. The duties would have to be paid and incumbrances of which the purchaser had notice discharged. As to any other incumbrances, he would obtain the legal estate as purchaser for value without notice.]

That would not prevent an undisclosed incumbrancer from bringing an action. He would probably fail, but he might succeed in making out constructive notice. The purchaser who bought an apparently simple title under a power or trust for sale ought not to be compelled to investigate and take ten beneficial titles with the attendant risks of law suits. Under condition 7 the vendor could refuse to give the usual covenants as to his own beneficial interest. The vendor cannot substitute a different title from that offered by the contract: *In re Bryant and Barningham's Contract.* (1)

[SWINFEN EADY J. In that case the title was not under the vendor's control, and he offered to obtain a new contract.]

In *In re Thompson and Holt* (2) the title was held good on the express ground that the first mortgagees were in fact exercising their power of sale, the second mortgagees and the mortgagor's trustee in bankruptcy having waived the three months' statutory notice of sale, and only joining to confirm the sale by passing any interest they might have. In *In re Head's Trustees and Macdonald* (3) the offer to join the beneficiaries was

(1) 44 Ch. D 218. (2) (1890) 44 Ch. D. 492.
(3) 45 Ch. D. 310, 315, 317.

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made too late, but Cotton L.J. said that, even if the beneficiaries had been willing to concur, there was the great difficulty that the title would then not be the title of the vendors, but the title of the beneficiaries, a different title from that which the purchaser agreed to take. He points out that this was the ratio decidendi of *In re Bryant and Barningham's Contract.* (1) Fry L.J. was not quite clear that the contract might not have been enforced, if the concurrence of the beneficiaries had been offered and obtained in time, but left the point open.

[SWINFEN EADY J. In that case the beneficiaries were not bound to concur at the date of the contract. Here they were bound.]

That is so. But their title is a different title from that offered by the contract. The written request of the beneficiaries was not disclosed till after the requisitions, and it is not clear that the purchaser could have enforced specific performance against them. The vendor says they are undisclosed principals, and has made them parties to the summons. But even if they are principals, their so-called agent contracted to sell as trustee with the concurrence of the life tenant, and that is the only contract they can enforce.

J. G. Wood, in reply. The vendor is bound to convey the entire legal estate as trustee, and the beneficiaries, including the vendor, are bound to concur and convey their respective interests as beneficial owners. There is no substance in the purchaser's objection. The capacity in which the vendor sells is immaterial so long as he controls the title at the date of the contract.

SWINFEN EADY J. (after stating the facts). If the 7th condition stood alone, the proper inference would be that the vendor was selling as trustee of the will under a power or trust for sale exercisable at the date of the contract. But it must be read with the previous provision that "The tenant for life of lot 1 will join in the conveyance to the purchaser for the purpose of releasing her life interest therein." This provision would be unnecessary if the vendor had an immediate power of or trust for sale. It points rather to a power or trust that has not yet arisen, with the idea

(1) 44 Ch. D. 218.

that it could be accelerated. At all events, it shews that the concurrence of at least one beneficiary was necessary, and militates against the suggestion that the vendor could sell under a power or trust without the concurrence of any beneficiary. The purchaser having objected to the title, the vendor and the beneficiaries, of whom he is one, have issued this summons. In my opinion, the beneficiaries having authorized and requested the vendor trustee in writing to sell the property, and the vendor having entered into the contract in pursuance of that written authority, the beneficiaries were legally bound to carry out the contract and concur in the conveyance. The vendor, who had sold at their written request, could compel them to join to enable him to carry out the contract.

Seeing, therefore, that at the date of the contract the legal estate was vested in the vendor as trustee, that he had the written request of all the beneficiaries to sell, and entered into the contract in pursuance of that request, so that he had a right to compel their concurrence, I am of opinion that the vendor has shewn a good title.

The present case is quite different from *In re Bryant and Barningham's Contract* (1), where, the vendors finding that they had no present trust for sale, offered to procure a conveyance from the life tenant, a person not bound to convey at their request. It also differs entirely from *In re Head's Trustees and Macdonald* (2), where the offer to procure the concurrence of the beneficiaries was not made till after the time for completion had expired, and long after the contract had been repudiated by the purchaser, and the beneficiaries were not even then bound to concur.

In the present case the beneficiaries were bound to concur at the date of the contract.

Duties must, of course, be paid, and incumbrances, if any, discharged. The purchaser will then obtain the legal estate free from any incumbrances of which he has no notice.

The purchasers' requisitions and objections have been sufficiently answered, and a good title has been shewn in accordance with the particulars and conditions; but, having regard to the

(1) 44 Ch. D. 218. (2) 45 Ch. D. 310, 315, 317.

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language of the 7th condition, the purchaser was fairly entitled to submit the question to the Court, and I make no order as to costs.

Solicitors: *Surr, Gribble & Oliver, for J. E. Elworthy, Curtis & Dawe, Plymouth; Philip J. Rutland, for A. E. S. Akaster, Devonport.*

G. R. A.

SWINFEN EADY J.
1907
Jan. 17.

In re WESTON AND THOMAS'S CONTRACT.

[1906 W. 2926.]

Vendor and Purchaser—Rescission—Reasonable Ground—Small Contingent Incumbrance—Refusal of Purchaser to accept Indemnity—Notice of Rescission—Without Prejudice.

A purchaser is not bound to accept an indemnity for a contingent incumbrance, however small the amount or remote the contingency, but is entitled to have it discharged.

Refusal to accept an indemnity is not in itself a "reasonable ground" for rescission under the usual condition.

A notice of rescission signed "without prejudice" is void.

VENDOR AND PURCHASER SUMMONS.

On June 25, 1906, the vendors sold by auction a property described in the particulars as "the freehold ground rent of 18*l.* per annum arising out of and amply secured by one shop and four dwelling-houses" therein described, "with reversion in 1938 to the rack rents, estimated at 148*l.* 4*s.* per annum gross, let on lease for a term of sixty-one years from Midsummer, 1877, at a ground rent of 18*l.* per annum." The price realized was 470*l.*, on which a deposit of 47*l.* was paid by the purchaser, the mortgagee in possession of the leasehold interest.

The 12th condition provided that "if any purchaser shall make and insist on any objection or requisition either as to title, conveyance, or any matter appearing on the particulars, conditions, or abstract, or otherwise, which the vendors shall be unable, or on the ground of difficulty, delay, or expense, or on any other reasonable ground unwilling, to remove or comply with, the vendors shall, notwithstanding any previous negotiation or

litigation, be at liberty, on giving to the purchaser not less than ten days' notice in writing, to annul the sale, in which case, unless the objection or requisition shall have been in the meantime withdrawn, the sale shall at the expiration of the notice be annulled, the purchaser being in that event entitled to a return of the deposit, but without interest, costs, or compensation."

The purchase was to be completed on August 14, 1906, and if from any cause other than the vendors' wilful default it was not then completed the purchaser was to pay 5 per cent. interest on the balance of the purchase-money.

The property was held in undivided third shares, the vendors holding two shares as beneficial owners and one share as trustees of their brother's settlement with power of sale. The vendors sold several other ground rents at the same sale.

On the investigation of title a question arose as to the succession duty payable on the death of the vendor's father, under whose will the property had passed, and on the death of his widow, who took a life interest thereunder.

The receipts shewed that duty had only been paid on the ground rent, and that the duty in respect of the increased value that would accrue on the determination of the lease if the vendors or their brother were still living had not been commuted under s. 20 of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51).

The purchaser's solicitors required the duty to be commuted and discharged by the vendors, but offered to accept the vendors' undertaking to do so, so as not to delay completion. They subsequently drew the attention of the vendors' solicitors to *In re Kidd and Gibbon's Contract* (1), shewing that this duty was a charge which must be borne by the vendors.

The vendors' solicitors pointed out that on the expiry of the lease the successors, if living, would be aged ninety-eight, ninety-seven, and ninety-two respectively, so that the 1 per cent. duty on the successors' interest, as valued by the Succession Duty Act tables, would only amount to a few shillings, even if it accrued, and they suggested it would be impracticable to commute it.

The purchaser's solicitors pressed the requisition, and on

(1) [1893] 1 Ch. 695.

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August 29, 1906, they wrote stating that the purchaser had placed the balance of the purchase-money on deposit, and would claim the rent from that day, and only pay deposit interest.

On August 30, 1906, the vendors' solicitors replied: "In accordance with your request, we now write definitely declining on behalf of the vendors to apply for commutation of possible claim to further succession duty thirty-two years hence, if the beneficiaries, who would then be respectively ninety-eight, ninety-seven, and ninety-two years of age, should be living. The contingency is too remote for calculation. The vendors will not object, however, if you think it worth while, to give the purchaser indemnity against such possible claim. Failing your acceptance of this, we hereby give you notice under the 12th condition to annul the sale. We are in receipt of your letter of yesterday as to balance purchase-money being placed at deposit, but do not agree to the claim. We write of course entirely without prejudice."

On September 7, 1906, the purchaser's solicitors replied that the duty should be discharged by the vendors, and unless they agreed to commute and pay the duty the purchaser would be advised to issue a vendor and purchaser summons.

On September 10, 1906, the vendors' solicitors replied: "We have received your letter of the 7th inst. The vendors are prepared forthwith to return the 47*l.* deposit paid in accordance with the notice given on the 30th ult. to annul the contract."

On October 11, 1906, the purchaser issued this summons for—(1.) a declaration that the vendors were liable for and ought to discharge the succession duty in respect of the whole of their interest in the property contracted to be sold; (2.) a declaration that the vendors had not rescinded, and were not entitled to rescind, the above-mentioned contract.

Eve, K.C., and *Crossfield*, for the purchaser. This duty is clearly an incumbrance which the vendors must discharge: *In re Kidd and Gibbon's Contract* (1); and the purchaser is not bound to accept an indemnity. The notice to rescind was bad in form, as, first, it was conditional, and, secondly, it was written

(1) [1893] 1 Ch. 695.

"without prejudice." In any case the vendors must shew reasonable ground for rescission. They cannot rescind on the mere ground that they do not wish to discharge a small incumbrance of this nature: *In re Jackson and Oakshott* (1); *In re Jackson and Haden's Contract.* (2)

MacSwinney, for the vendors. The vendors admit that they are liable for this duty, and that they cannot rescind arbitrarily. But here the duty cannot possibly amount to more than a few shillings, and the vendors offered an indemnity, meaning a personal indemnity. In Williams on Vendor and Purchaser (p. 217), after dealing with cases of sales by life tenant and remainderman, where the duty prima facie falls on the purchaser, it is stated, "In these cases, however, if the vendors simply contracted to sell an estate in fee without shewing the liability to succession duty, the purchaser could require them to procure the duty to be commuted or otherwise to indemnify him against its payment." This shews that the purchaser cannot insist on commutation if a reasonable indemnity is offered. Having regard to the smallness of the amount in this case, the vendors' personal indemnity was sufficient.

The commutation of a contingent infinitesimal charge like this would cause unreasonable difficulty, delay, and expense, as it would probably involve commutation on all the ground rents. It was unreasonable of the purchaser to insist on it, and under the circumstances the vendors had a "reasonable ground" for rescission. The notice of rescission was valid, as the purchaser did not accept the indemnity offered therein. The words "without prejudice" do not affect the validity of the notice. Even if the vendors have not formally rescinded, they are still entitled to do so by a fresh notice.

Eve, K.C., in reply. The commutation would not have caused delay, as the purchaser offered to accept the vendors' undertaking to commute, and there is no evidence of any difficulty or expense in commuting.

SWINFEN EADY J., after stating the facts and expressing his regret that a vendor and purchaser summons should have been

(1) (1880) 14 Ch. D. 851. (2) [1906] 1 Ch. 412.

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issued where the amount in dispute was so small, continued:—Although in my opinion the purchaser would have run no substantial risk if she had accepted the vendors' indemnity for this small amount of contingent duty, I cannot say that in point of law she was bound to accept an indemnity. The vendors were bound to clear the property, and had no legal right to say they would not discharge the incumbrance, but would only give an indemnity. They were bound to discharge the incumbrance. Instead of doing so, their solicitors wrote offering an indemnity and saying: "Failing your acceptance of this, we hereby give you notice under the 12th condition to annul the sale. . . . . We write of course entirely without prejudice." In my opinion a letter written "without prejudice" was not a valid notice to annul the sale within the 12th condition.

I am further of opinion that the vendors were not and are not entitled to rescind merely because the purchaser asked them to clear off this small charge, and they did not see their way to do so. The requisition is not a requisition which the vendors are unable, "or on the ground of difficulty, delay, or expense, or on any other reasonable ground unwilling," to comply with within the 12th condition. There is no evidence that there would be any "difficulty, delay, or expense" in assessing and commuting the duty, and the vendors have shewn no "other reasonable ground" for refusing to do so. There is really no reasonable ground why they should not ascertain and pay this small amount. The purchaser is therefore right in her contention that the duty must be borne by the vendors, and that under the circumstances they were not and are not entitled to rescind.

There remains the question of costs. The vendors have purported to rescind, and it may be of importance to the purchaser, who is mortgagee in possession of the leasehold interest, to have it determined that this particular contract is still subsisting, and cannot be rescinded on the ground of this requisition. The vendors, who have failed, must pay the costs of the summons.

Solicitors: *Crossfield, Cushing & Wheldon; Perkins & Weston.*

G. R. A.

In re LOVELL AND COLLARD'S CONTRACT.

SWINFEN EADY J.

1907

Jan. 25.

[1906 L. 2626.]

Revenue — Stamps — Foreclosure Order before 1898 — *Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *ss.* 54, 57—*Finance Act*, 1898 (61 & 62 *Vict. c.* 10), *s.* 6.

Sect. 54 of the Stamp Act, 1891, provides that "for the purposes of this Act the expression 'conveyance on sale' includes . . . . every decree or order of any Court . . . . whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser. . . . ."

Sect. 6 of the Finance Act, 1898, provides that "for the removal of doubts . . . . it is hereby declared that the definition of 'conveyance on sale' in the said s. 54 includes a decree or order for . . . . foreclosure":—

Held, that the later section was declaratory, and therefore retrospective, so that an order of 1896 foreclosing a legal mortgage required stamping as a "conveyance on sale" within the earlier section.

Attorney-General v. *Theobald* (1890), 24 Q. B. D. 557, followed.

Harding v. *Queensland Stamp Commissioners*, [1898] A. C. 769, 775, distinguished.

Semble, having regard to the reasoning in *Huntington* v. *Inland Revenue Commissioners*, [1896] 1 Q. B. 422, and *Heath* v. *Pugh*, (1881) 6 Q. B. D. 345, 360, the foreclosure order really fell within the earlier section even before it was construed by the later section.

Vendor and Purchaser Summons.

By an agreement in writing, dated October 1, 1906, the vendor, who had bought Eddington House on December 18, 1897, agreed to sell it to the purchaser for 2700*l.*

One of the links of the vendor's title consisted of an order for foreclosure absolute, dated January 30, 1896, whereby a legal mortgage for 22,000*l.* on Eddington House, and considerable other property belonging to the vendor's predecessors in title, was foreclosed. This order was only stamped with a 5*s.* stamp.

The purchaser contended that the foreclosure order was a "conveyance on sale" within ss. 54 and 57 of the Stamp Act,

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1891 (1), as construed by s. 6 of the Finance Act, 1898 (2), and required it to be stamped ad valorem on the total value of the property foreclosed, pointing out that foreclosure orders dated between 1891 and 1898 could be stamped without penalty.

The vendor contended that, as the foreclosure order was made before the Finance Act, 1898, it did not require an ad valorem stamp.

After some correspondence the vendor issued this summons for a declaration that the purchaser's objections had been sufficiently answered.

The purchase was subsequently completed, the vendor depositing 110*l.* in the joint names of the vendor's and purchaser's solicitors to meet the duty if the Court held it payable.

Eve, K.C., and *Fairfax Luxmoore*, for the vendor. The vendor owns part of a large property which was mortgaged for 22,000*l.*

(1) The Stamp Act, 1891, commencing January 1, 1892, provides as follows:—

"CONVEYANCES ON SALE.

Sect. 54: "For the purposes of this Act the expression 'conveyance on sale' includes every instrument, and every decree or order of any Court or of any commissioners, whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf or by his direction."

Sect. 57: "Where any property is conveyed to any person in consideration, wholly or in part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, the debt, money, or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with ad valorem duty."

(2) The Finance Act, 1898, passed July 1, 1898, provides as follows:—

Sect. 6: "For the removal of doubts with reference to the effect of ss. 54 and 57 of the Stamp Act, 1891, it is hereby declared that the definition of 'conveyance on sale' in the said s. 54 includes a decree or order for, or having the effect of an order for, foreclosure.

"Provided that—

"(*a*) The ad valorem stamp duty upon any such decree or order shall not exceed the duty on a sum equal to the value of the property to which the decree or order relates, and where the decree or order states that value that statement shall be conclusive for the purpose of determining the amount of the duty; and

"(*b*) Where ad valorem stamp duty is paid upon such decree or order, any conveyance following upon such decree or order shall be exempt from the ad valorem stamp duty."

The vendor's portion is only worth 2700*l.* If this duty is payable the vendor will have to pay the duty on the whole estate. Now on January 30, 1896, when this foreclosure order was made, it was not the practice to stamp foreclosure orders ad valorem. It had been decided on January 16 that a conveyance pursuant to an order foreclosing an equitable mortgage required stamping as a "conveyance on sale": *Huntington* v. *Inland Revenue Commissioners* (1); but the present question was not decided. It is difficult to see how an order foreclosing the equity of redemption on a legal mortgage, where no conveyance was required, could have been treated as a "conveyance on sale" or as an order vesting any property, estate, or interest in a purchaser "upon the sale thereof" within s. 54 of the Stamp Act, 1891, and if there had been any judicial doubt, the section, being a taxing section, would have been construed against the Crown: *Inland Revenue Commissioners* v. *Angus.* (2) Sect. 6 of the Finance Act, 1898, which adopts a construction in favour of the Crown, was passed owing to the suggestion of Lord Herschell in *Inland Revenue Commissioners* v. *Tod* (3), and as it altered a practice permitted by the Commissioners, it ought, according to Lord Herschell's suggestion, to have been non-retrospective. Now s. 6, though declaratory in form, really imposes a new burden. It is therefore not retrospective: *Harding* v. *Queensland Stamp Commissioners.* (4)

[SWINFEN EADY J. In that case the duty was clearly not payable under the earlier Act, which the later Act purported to amend, not to construe.]

In the present case the duty was clearly not payable, in spite of the Commissioners' doubts, which s. 6 was passed to remove. The Scottish case of *Inland Revenue Commissioners* v. *Tod* (3) was expressly decided on the ground that the sheriff's decree vested the property in the creditor "at the price" at which it had unsuccessfully been exposed for sale. This was tantamount to a sale. A foreclosure decree merely bars the equity of redemption, and Lord Macnaghten thought the English authorities inapplicable, saying, "The analogy between a foreclosure decree

(1) [1896] 1 Q. B. 422.
(2) (1889) 23 Q. B. D. 579, 589.
(3) [1898] A. C. 399, 416, 417, 418.
(4) [1898] A. C. 769, 774, 775.

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and a decree under the Heritable Securities Act is not so close as to make it necessary to consider them."

Micklem, K.C., and *Bryan Farrer*, for the purchaser. In *Heath* v. *Pugh* (1), in the Court of Appeal, Lord Selborne L.C. said in reference to the foreclosure of a legal mortgage: "The effect of an order of foreclosure absolute is to vest the ownership of, and the beneficial title to, the land, for the first time, in the person who previously was a mere incumbrancer. The equitable estate of the mortgagor is then forfeited and transferred to the mortgagee. It is transferred as effectually as if it had been conveyed or released. 'A foreclosure' said Lord Hardwicke 'is considered as a new purchase of the land.'" His judgment was adopted by the House of Lords. A foreclosure order ought, therefore, to have been stamped as a "conveyance on sale" under the Stamp Act, 1891, s. 54. As, however, the point was considered doubtful, s. 6 of the Finance Act, 1898, was passed. That section removes any possible doubt, and declares the construction of s. 54. That construction is retrospective: *Attorney-General* v. *Theobald*. (2) The vendor says that foreclosure orders were not stamped ad valorem, before the Finance Act, 1898. But Alpe on Stamp Duties (5th ed., October, 1896), p. 114, states that "an order for foreclosure in favour of a legal mortgagee with or without words of vesting is chargeable with conveyance duty. A conveyance . . . . in pursuance of an order for foreclosure of an equitable mortgage is chargeable: *Huntington* v. *Inland Revenue Commissioners*." (3) The previous edition (4th ed., November, 1894) stated that neither was chargeable. The practice was evidently changed after *Huntington* v. *Inland Revenue Commissioners* (3), which virtually decided the point.

Luxmoore, in reply. In *Attorney-General* v. *Theobald* (2) the declaratory Act was passed after the volunteers' title accrued, but before the money was paid over by the trustees of the marriage settlement. It was the express ground of the judgments in *Attorney-General* v. *Marquis of Hertford* (4), on which the Divisional Court in *Attorney-General* v. *Theobald* (2) based

(1) 6 Q. B. D. 345, 360; 7 App. Cas. 235.
(2) 24 Q. B. D. 557.
(3) [1896] 1 Q. B. 422.
(4) (1849) 3 Ex. 670.

their decision. *Heath* v. *Pugh* (1) decided that a foreclosure order passed the mortgagor's beneficial title or equitable estate to the mortgagee, but not that it passed it "on the sale thereof." That question was not before the Court, and Lord Selborne's observations were not directed to any such point.

SWINFEN EADY J. (after stating the facts). The vendor contended that ad valorem duty was not payable on the foreclosure order of January 30, 1896, under s. 54 of the Stamp Act, 1891, and that although in transactions since the Finance Act, 1898, s. 6, ad valorem duty is payable on foreclosure orders, that section does not affect the present case, as, prior to that section, it was at least doubtful whether ad valorem duty was payable, and it ought not to be imposed on antecedent transactions unless the section clearly imposes it. He also contended that it was quite clear that ad valorem duty was not payable under the Stamp Act, 1891, but I am unable to accept that view. Sect. 6 of the Finance Act, 1898, provides that "for the removal of doubts with reference to the effect of ss. 54 and 57 of the Stamp Act, 1891, it is hereby declared that the definition of 'conveyance on sale' in the said s. 54 includes a decree or order for . . . . foreclosure," and where the Legislature enacts a provision for the removal of doubts, I cannot say that no doubts existed.

Moreover, on the construction of s. 54 of the Stamp Act, 1891, I am of opinion that ad valorem duty was payable on foreclosure orders. I think this follows from the reasoning of Wright and Kennedy JJ. in *Huntington* v. *Inland Revenue Commissioners* (2), though the only point actually decided was that a conveyance in pursuance of an order foreclosing an equitable mortgage required an ad valorem stamp as a "conveyance on sale" within s. 54 of the Stamp Act, 1891. If in connection with that the remarks of Lord Selborne L.C., in *Heath* v. *Pugh* (1), as to the effect of an order for foreclosure absolute are considered, it follows that the effect of such an order was to bring the case within s. 54 of the Stamp Act, 1891, under which a "conveyance on sale" includes "every decree or order . . . . whereby any property, or any estate or interest in any

(1) 6 Q. B. D. 345, 360; 7 App. Cas. 235. (2) [1896] 1 Q. B. 422.

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property, upon the sale thereof is transferred to or vested in a purchaser. . . . ." Even if that be not the true construction, the point was at all events doubtful, and s. 6 of the Finance Act, 1898, declares that the definition of "conveyance on sale" in s. 54 of the Stamp Act, 1891, includes foreclosure orders. It was urged that in substance it imposed a new duty, so that though in form declaratory it was not retrospective. *Harding* v. *Queensland Stamp Commissioners* (1) was relied on as shewing that even if a statute purports to be declaratory, it is not necessarily retrospective if it imposes a new duty, but that case has no application to the present. In that case there was no doubt as to the construction of the Queensland "Succession and Probate Duties Act, 1892." Lord Hobhouse says: "The Queensland Legislature passed their Succession Duty Act in terms identical with those of the English Act of 1853. It is impossible to suppose that they did not intend those terms to be read in the sense affixed to them by the English tribunals, and in which they would be read by every lawyer and every official conversant with the subject-matter." It was therefore clear, in that case, that no duty was payable under the Queensland Act of 1892. Now, the Queensland "Succession and Probate Duties Act, 1892, Amendment Act of 1895" did not purport to construe the Act of 1892. Sect. 2 provided that "It is hereby declared that upon the issue of any grant of probate or administration in Queensland, succession duty is chargeable in respect of all property within Queensland, although the testator or intestate may not have had his domicil in Queensland." The Supreme Court held that the section was declaratory because of the opening expression, "It is hereby declared," but Lord Hobhouse said: "Their Lordships cannot take such a view of the Act. The use of the expression, 'It is declared,' to introduce new rules of law is not incorrect, and is far from uncommon. The nature of the Act must be determined from its provisions. Now, the Act does not contain any words to shew that it purports to construe the Act of 1892; it does purport to amend it; every other of its provisions is in language prospective, and in s. 2 itself the new rule is to take effect 'upon the issue of any grant of probate,'

(1) [1898] A. C. 769, 774, 775.

which is not fitting language to apply to estates for which probate has already been granted. In fact, the language of the Act points, as their Lordships think, distinctly to future operations." In the present case, on the contrary, s. 6 of the Finance Act, 1898, expressly declares that the definition of "conveyance on sale" in the Stamp Act, 1891, includes a foreclosure order.

A somewhat similar question arose in *Attorney-General* v. *Theobald* (1), with reference to stamp duty on personal property passing under a marriage settlement, reserving a life interest to the settlor. In that case it was held that the expression "voluntary settlement" in the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38, must be read according to the construction declared by the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11, although the property passed to the ultimate volunteer beneficiaries under the marriage settlement, before the latter Act came into force; and that stamp duty was therefore payable. In the present case I am of opinion that s. 6 of the Finance Act, 1898, is declaratory of the construction of s. 54 of the Stamp Act, 1891, and that ad valorem duty is payable on the foreclosure order of 1896, and was so payable when that order was made.

It was stated at the bar that it was not the practice to stamp foreclosure orders ad valorem until the Finance Act, 1898, was passed, but this is inaccurate. In Alpe on Stamp Duties, 5th ed. (October, 1896), p. 114, it is stated that a foreclosure order is chargeable with conveyance duty. The foundation for this statement appears to be that certain correspondence passed between the senior registrar and the Inland Revenue Commissioners about stamping foreclosure orders with ad valorem stamps; the point was at first regarded as doubtful, but after the decision in *Huntington* v. *Inland Revenue Commissioners* (2) the opinion of the law officers was obtained, and since September, 1896, all orders foreclosing legal mortgages have in actual practice been required to be stamped ad valorem. The order in *Lightwood* v. *Bursill*, September 1, 1896 (Reg. Lib.), appears to have been the first order so stamped. Even if the duty had not in practice been required before the passing of the Finance Act, it would

(1) 24 Q. B. D. 557. (2) [1896] 1 Q. B. 422.

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not affect the legal question. I therefore determine that the purchaser's objections have not been sufficiently answered. The vendor must pay the costs of the summons.

Solicitors: *Lovell & White; Marson, Son & Haigh.*

G. R. A.

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BATTEN POOLL *v.* KENNEDY.

[1904 B. 903.]

Construction—Conveyance—Reservation—Exception—"All Mines and Veins of Coal"—Underground Road—Carriage of Foreign Minerals—Property in Sub-soil—Payment of Rent—Mistake—Estoppel.

The predecessors in title of the defendants were owners in fee simple of land, including both the surface and the strata below the surface. They conveyed the land to the plaintiff's predecessors by a deed which contained an exception and reservation of "all mines and veins of coal in or under" the land. The defendants and their predecessors worked the coal mines under the land and made an underground road, which was not confined to the seams of coal, but was cut also through the adjacent strata. Along this road they carried coal obtained from mines beyond the limits of the land conveyed to the plaintiff's predecessors:—

Held that, by virtue of the exception, the property in the strata below the surface remained in the defendants sufficiently to entitle them to construct roads therein and use them in any way they pleased.

Proud v. *Bates*, (1865) 34 L. J. (Ch.) 406; *Duke of Hamilton* v. *Graham*, (1871) L. R. 2 H. L. Sc. 166; and *Eardley* v. *Granville*, (1876) 3 Ch. D. 826, followed.

Ramsay v. *Blair*, (1876) 1 App. Cas. 701, distinguished.

The defendants and their predecessors had for some years paid rent to the plaintiff in the belief that they were bound to do so under a licence from the plaintiff:—

Held that this, being a voluntary payment made under a supposed legal liability, created in law no obligation at all, and that the defendants were not thereby estopped from setting up their title under the conveyance.

THIS was an action for rent alleged to be due in respect of a licence to make an underground road for coal-mining purposes.

The predecessors in title of the defendants were, prior to the year 1768, owners both of the surface of and of the mines

underneath lands forming part of the manor of Timsbury, in Somerset. By an indenture of September 9, 1768, confirming previous deeds they granted these lands in fee simple to the predecessors in title of the plaintiff, and the conveyance contained this reservation: "Other than and except and always reserved out of these presents unto the said Alexander Adams Jacob Mogg John Crang William Bush and William Savage" (the predecessors of the defendants) "their heirs and assigns all mines and veins of coal in or under the said closes pieces and parcels of land and premises hereby released or any part or parcel thereof with free liberty of ingress egress and regress to dig mine sink and make any pit or pits and to erect any engine or engines or other works for the gaining and landing the said coals and also all privileges and ways necessary and wanting for landing and carrying away the said coals;" the defendants' predecessors, their heirs and assigns, paying and making from time to time reasonable satisfaction for the damages thereby sustained.

The defendants carried on a mining and colliery business, working two collieries within and in the neighbourhood of the manor of Timsbury. For this purpose they and their predecessors had constructed an underground road running through the seams of coal lying under the property conveyed to the plaintiff's predecessors. It was not confined to, but was of a greater height than, the seams of coal, and was cut partly through the adjacent strata. The plaintiff complained that the road had been unduly enlarged, and he contended that the defendants had no right to use it for the carriage of coal dug from other mines beyond the limits of the property.

The defendants insisted that the road was constructed entirely in their own property reserved to them by the conveyance, and that they had a perfect right to carry foreign coal along it. The result of the evidence on this point is stated in the judgment of Warrington J.

The plaintiff further alleged that his predecessors had in 1822 granted a lease to certain persons who were working the mines under the lands conveyed to him in 1768. That lease contained a grant of licence and authority for the persons named, their

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executors, administrators and assigns, to drive, dig and use pits, shafts and levels under the lands in question, and to make roads, mine for and land such coals and other minerals, and such coals and other minerals raised under those lands or under other adjoining lands, to convey in and through such pits or roads to the pits of the said Timsbury Manor, and to hold these powers for a term of 500 years, yielding and paying a rent of 100*l.*; and it contained a covenant by these persons to pay that rent. It was admitted by paragraph 10 of the statement of defence that "the defendants, or some of them or their predecessors in title, have in fact since the year 1877 paid to the plaintiff, but not to any of the predecessors in title of the plaintiff, the yearly sum of 100*l.*, down to March 25, 1903, as if in respect of the possession or occupation of the said lands or some of them under the said indenture of July 10, 1822. Such payments however were made under a mistake as to the facts and under the belief (contrary to the facts) that the exercise of such rights as the defendants were exercising in or under the lands aforesaid was referable to the said indenture of July 10, 1822."

Astbury, K.C., and *C. A. S. Garland*, for the plaintiff. Except under the lease of 1822, the defendants have no right to carry through or under the plaintiff's land coal which they have dug elsewhere. The exception in the conveyances of 1768 reserved only the coal. It gave the defendants no right to carry anything except through the coal itself. This exception is in similar terms to the first one in question in *Ramsay* v. *Blair* (1), where the words were "coals and coal-heughs," which were interpreted to mean "coal pits." Lord Selborne said that the expression coals and coal mines meant, "when unopened mines are spoken of, nothing more nor less than the veins or seams of coal underlying the surface." Here the defendants have made this road through other strata as well as through the coal. The defendants rely on *Proud* v. *Bates* (2) and *Duke of Hamilton* v. *Graham* (3), but in those cases all the minerals were reserved, and the property in

(1) 1 App. Cas. 701, 705. (2) 34 L. J. (Ch.) 406.
(3) L. R. 2 H. L. Sc. 166.

all the strata below the surface remained in the grantors. This is only a wayleave for a special purpose, and must be strictly construed: Gale on Easements, 7th ed. p. 324. The right asserted by the defendants is not reserved to them: Platt on Leases, vol. ii. p. 39. Further, they were not justified in enlarging the road after the coal had been taken away. The defendants cannot set up any such right against us, for they have paid rent to us all these years for a wayleave through the coal, and they are estopped from denying our title. Mere use and occupation by them, apart from a lease, would be sufficient to put them in this position if they paid rent.

Warmington, K.C., Rowden, K.C., and *J. G. Wood*, for the defendants. The chief question in this action is one of construction—viz., what is the meaning of the reservation in the deed of 1768. It is admitted that it is still operative, and that the defendants and their predecessors have held under it ever since. The effect of the reservation was to cut the land into two parts; the surface was conveyed and the part below the surface retained. The underground part is just as much property as the surface. The defendants retained that property, and were entitled to make any road they pleased through it and to use it as they liked. This is really not a reservation, but an exception of property which was always theirs. They do not rely on the reservation of privileges and ways, but on the exception of "all mines and veins of coal." The language of the clause is not like that in *Ramsay* v. *Blair* (1), and Lord Selborne's remarks do not apply to it.

An exception, or grant, of "mines" of coal includes not merely the bed or seam of the mineral itself, but also so much of the subjacent or superincumbent strata as is necessarily or reasonably removed for the purpose of getting out and removing the mineral. The "mine" is thus the whole of the strata so removed, and the space left after that is removed; and this is, and remains, the property of the person in whose favour such exception or grant is made, and he can use it for any purpose he pleases, as in exercise of the rights incident to such property, without any special reservation or grant of powers of user. As one mode of

(1) 1 App. Cas. 701.

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enjoyment of such property he may carry foreign minerals through the mine formed in working the coal without any express grant of any right so to do; and this he may do whether all the coal excepted or granted has been worked out or not. The defendants are carrying foreign coal under the plaintiff's lands only by means of roads formed for the purpose of getting the excepted coal, and therefore are carrying through the "mine" which is still the defendants' own property. The defendants do not claim under the exception all mines and minerals beneath the surface, but they claim in respect of each seam of coal to have a "mine," which may or may not include parts of the adjacent strata. The soil between such several "mines" we admit to be the plaintiff's. The right to get and carry excepted minerals is a right arising out of and incident to their ownership, and is not an easement: *Proud* v. *Bates* (1); *Duke of Hamilton* v. *Graham* (2); *Eardley* v. *Granville.* (3)

There is no question of estoppel. The road was not made under the lease of 1822, but under the conveyance of 1768. No doubt that deed was overlooked and rent was subsequently paid. But those payments were not really rent. Rent cannot be reserved out of a mere privilege or easement in land: Carson's Real Property Statutes, p. 117; *Buszard* v. *Capel* (4); *In re Lord Gerard and Beecham's Contract.* (5) A payment of that sort does not create an estoppel. Where a person has made payments under a mistaken belief, the Court will look at the real facts. Under the circumstances of this case the payments did not create a tenancy.

T. T. Method, for other parties.

Astbury, K.C., in reply. There is no authority for the proposition that a grant of coal mines includes the other strata beneath the surface. It only gives such a right of way as is necessary to work the coal: *Durham and Sunderland Ry. Co.* v. *Walker.* (6)

[WARRINGTON J. The question is whether the defendants owned the fee simple of the ground through which the road was made.]

(1) 34 L. J. (Ch.) 406.
(2) L. R. 2 H. L. Sc. 166.
(3) 3 Ch. D. 826.
(4) (1828) 8 B. & C. 141.
(5) [1894] 3 Ch. 295, 315.
(6) (1842) 2 Q. B. 940.

They cannot set up that defence after paying rent to us. There is no evidence that they paid by mistake.

Cur. adv. vult.

July 30. WARRINGTON J. referred to the facts and the arguments and read the reservation contained in the deed of 1768, and proceeded:—The first question is whether this road is made in the property of the defendants or in that of the plaintiff. The defendants rely, not on the reservation of "privileges and ways necessary and wanting for landing and carrying away the said coals," but upon the exception of "all mines and veins of coal." Their case is that by those deeds of conveyance the solum was divided into two separate properties, one of which was conveyed to the predecessors of the plaintiff, the other of which was retained in their own hands by the predecessors of the defendants; that, so far as regards that part of the exception and reservation which contained the words "mines and veins of coal," it was an exception in the true sense and never passed out of their hands. Now, that is something of importance, because, as was pointed out in *Duke of Hamilton* v. *Graham* (1) and in *Proud* v. *Bates* (2), where the owner of the whole grants away the surface excepting the mines, it is reasonable to suppose that he intends that exception to cover all that may fairly and properly be included in the expression "mines."

The first question is one of law, namely, what is, upon the true construction of these grants—or deeds of release, as they were called in those days—the meaning of "all mines and veins of coal in or under the land and premises hereby released"? On the authorities, it is plain that that expression "mines of coal" means more than merely the coal. There are two cases which have been referred to in argument, and which are always referred to on questions similar to this. The first of those is *Duke of Hamilton* v. *Graham*. (1) If anything that case was a less strong case than the present. There, as here, the title of the mine-owner was contained in a reservation. The Duke of Hamilton, having the complete dominion over a certain estate, granted the estate away by a deed which contained this reservation,

(1) L. R. 2 H. L. Sc. 166. (2) 34 L. J. (Ch.) 406.

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"Reserving always to the said Duke of Hamilton, and his heirs and successors, all and sundry the coal and limestone within the bounds of the lands before specified, so as it shall be lawful to the said Duke and his foresaids to sett down coalpits, shanks, and sinks, and win coal and limestone, within the bounds of the said lands, or any part thereof, and to make all engines and easements necessary for carrying on the said coal and limestone works, and free ish and entry thereto for making sale thereof and away taking the same"; the Duke of Hamilton making satisfaction for damage. It was held that the Duke of Hamilton, as absolute proprietor of the reserved coal and limestone, might make a tunnel through for the conveyance of other minerals belonging to him in the lands adjacent; and it was further held that the effect of that reservation was to give, or rather to reserve, to the Duke of Hamilton a right of property or absolute ownership and not a mere servitude or easement, and that the surface and the minerals became separate tenements severed in title. Lord Westbury in that case, in addressing the House of Lords, made these remarks (1): "The undiminished, undeteriorated, absolute estate in the mines": I pause there for a moment to point out that the words of the reservation were less favourable to the Duke of Hamilton in that case than they are in the present, because the expression was "coal and limestone." Notwithstanding that, Lord Westbury was of opinion that the reservation of the coal was a reservation of the mines. I will now go on with his remarks. He says (1): "The undiminished, undeteriorated, absolute estate in the mines is not, and never was intended to be, affected by the grant to the pursuer's author; and therefore the subject of the estate may be enjoyed in every way in which it was competent or fit to enjoy it antecedently to the grant of the dominium utile. You may approach it laterally, from another estate, for the purpose of winning the minerals. You may use the strata which you have reserved to yourself, or rather declare to remain in yourself (for the word 'reservation' introduces some obscurity and confusion of thought into the matter), in any matter consistent with ownership. You may traverse it from any adjoining land

(1) L. R. 2 H. L. Sc. 179.

you have. You may create a road or tunnel through it. And you may through that road or tunnel carry either the minerals or any other proceeds of an adjoining estate. You, therefore, have, for there is nothing to restrain you, the same universal right and unlimited power of enjoyment of the estate that remains in you, as you had antecedently to the grant of the dominium utile, the enjoyment of which that grant of the dominium utile in no respect impairs or affects. I hold, my Lords, that anything remaining in pleno dominio of the superior is capable of being won, enjoyed, and dealt with precisely as if there had been no grant to the author of the pursuer." And Lord Colonsay, in the same case, refers to the opinion of some of the judges in the Court below, and quotes that opinion in these words (1): "On the same principle I hold it to be equally objectionable to bring the coals of an adjoining estate into Cambuslang, and carry them underground through that property into an adjoining coalfield. This could not be done on the surface of the lands, and it can as little be done in the excavated waste, forming a tunnel underground." That is language with which Lord Colonsay does not agree. Then he goes on to say: "That is placing the rights of the Duke of Hamilton in the minerals upon no higher footing than the right he has upon the surface. It is placing a right of property in the same position as a right of servitude. There is no doubt that the Duke of Hamilton was not entitled to increase the burden upon the servitude on the surface by bringing the minerals from his other property over the surface. The surface was the servient tenement, and the minerals under that tenement were the dominant tenement in regard to that particular right of servitude. But that principle does not apply in regard to the right of property, and to say that he is carrying the minerals through the property of the pursuer is another mistake. He is carrying them through his own property, and not through the property of the pursuer at all." Now, if the site of the mines in this case is the property of the defendants—if the road is in their property—then that case is directly in point. With reference to that last question I have been referred to a case before the late Master of the Rolls

(1) L. R. 2 H. L. Sc. 181.

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of *Eardley* v. *Granville*. (1) That case is of great importance, because the action was brought against the lord of the manor, and the Master of the Rolls discussed the difference between the position of a lord of the manor, who is entitled to minerals, and the position of a landowner who has, as in the present case, severed the surface from the mines. In reference to that, after pointing out how limited is the right of the lord of the manor in respect of the minerals beneath the surface, the Master of the Rolls goes on to say this (2): "I take it that the law is clearly settled, and I am surprised to hear it disputed." That is with regard to copyhold. "In the first place, the law is laid down, perhaps not as accurately as might be wished as regards the words used, by Lord Campbell in *Bowser* v. *Maclean* (3)—'I am inclined to think that a mistake has been committed in not distinguishing between a copyhold tenement with minerals under it, and freehold land leased with a reservation of the minerals'"—then the Master of the Rolls interjects some important words, namely, "he should have said 'of the mines,' but he has used the words 'reservation of the minerals,' meaning an exception of the mines." Then the Master of the Rolls goes on, reading from Lord Campbell's judgment, "'or freehold land where the surface belongs to one owner and the subsoil, containing minerals, belongs to another, as separate tenements divided from each other vertically, instead of laterally.' That is quite intelligible; what he means is this—he does not say it, but he means it—If a freeholder grants lands excepting mines he severs his estate vertically, i.e. he grants out his estate in parallel horizontal layers, and the grantee only gets the parallel layer granted to him, and does not get any underlying mineral layer or stratum. That underlying stratum remains in the grantor. The freeholder retains the mineral stratum as part of his ownership; and whether or not he takes the minerals or subsoil out of the stratum, the stratum still belongs to him as part of the vertical section of the land." Now, later on, after referring to the case of *Duke of Hamilton* v. *Graham* (4), and pointing out that it does not alter the law as previously understood, he

(1) 3 Ch. D. 826.
(2) Ibid. 833.
(3) (1860) 2 D. F. & J. 415, 420.
(4) L. R. 2 H. L. Sc. 166.

goes on to say this: "It exactly concurs, therefore, in its reasoning with the decision of Wood V.-C. in the case of *Proud* v. *Bates* (1), and the decision of Lord Campbell in *Bowser* v. *Maclean* (2), that where a freeholder grants lands excepting the mines, he intends, first of all, as a matter of construction, to except not merely minerals, but the portion of the subsoil containing the minerals; in other words, to retain a stratum of the property. And if he does that, of course the lessee or grantee has no title whatever to the portion of the stratum reserved. That is all that the case of *Duke of Hamilton* v. *Graham* (3) decided. It decided that the same law applies to Scotland which applies to England. In a case like that the word 'mines' meant subsoil containing the minerals, and not merely the minerals themselves."

The Master of the Rolls, therefore, although the reservation in the case of *Duke of Hamilton* v. *Graham* (3) was only of the coals and limestone, clearly considered that it amounted, in construction, to a reservation of the coal and limestone mines.

Now against those two authorities the plaintiff cites another case in the House of Lords of *Ramsay* v. *Blair*. (4) In that case there were three reservations. In two of them it was held they were not sufficient to entitle the person in whose favour they were made to carry foreign coal; in the third it was held that it was sufficient so to enable them. When that case is looked at it will be found that on the construction of the grants it is clear that the House of Lords held that it was to be distinguished from *Duke of Hamilton* v. *Graham*. (3) So far as the right of entry into the land of the grantee was concerned, the reservation was strictly a reservation of an easement—that is to say, the grants of certain rights and privileges; and the facts themselves in that case were not, as in the case of *Duke of Hamilton* v. *Graham* (3), and in the present case, sufficient to sever the land into parallel layers. First of all the grants were in these terms. The first reserved the coals and coal-heughs to be won and disposed upon by the grantor; the second excepted the coal within the subject of the grants, which was expressly reserved to the grantor with full power for him to dig for, work, win, and

(1) 34 L. J. (Ch.) 406.
(2) 2 D. F. & J. 415.
(3) L. R. 2 H. L. Sc. 166.
(4) 1 App. Cas. 701.

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carry away the same; the third reserved to the grantor the whole coal stone quarries and all other metals and minerals within it. Now, with regard to the first two, each of the noble Lords who addressed the House of Lords considered that they reserved a mere privilege to get the coal: the only one that created any difficulty was the first one, which is the expression "coals and coal-heughs"; and there seems to be some doubt what that expression meant. Lord Selborne says (and this is the only passage, I think, in any of the judgments which creates any difficulty in the present case) (1): "The expression 'coal-heughs' is interpreted to mean coal pits. As there were no other pits at that time under this land, I take that as equivalent to coal mines; but coals and coal mines mean, I apprehend, when unopened mines are spoken of, nothing more nor less than the veins or seams of coal underlying the surface. Whatever he can do within the limits of those veins or seams, whether before or after their exhaustion by working, is still permitted to him by these interlocutors, and the question arises solely as to the other strata, which are neither coals nor coal mines." As I say, I think that is the only passage which causes any difficulty, but I do not consider that that passage, being only a dictum, and being confined to the case of entirely unopened mines, is applicable to this case. I have insufficient evidence on the point in the present case, and I should not infer that these were unopened mines. Therefore I do not consider that that dictum is strong enough to outweigh the carefully considered judgment of the Master of the Rolls in the case of *Eardley* v. *Granville* (2), and I come to the conclusion that the reservation of "all mines and veins of coal" includes more than the mere layer of the coal itself, that it includes at all events some part—how much it is not material to decide—of the underlying strata.

Now is this road enclosed in that part of the underlying strata which, in my view, is comprised in the expression "mines of coal"? The facts with regard to that are these. This road is a main road connecting the bed, the lower Conygre Colliery, not only with the underground portion of the piece of land on which the plaintiff founds his title in this case, but with coal at a much

(1) 1 App. Cas. 705. (2) 3 Ch. D. 826.

greater distance, much of which coal is in the manor of Timsbury, and was included in the reservation contained in those deeds of 1768. There are under that land in this district four seams of coal. The first has been ascertained to be 2 ft. 4 in. in depth, and the next one below it 1 ft. 4 in. in depth. This road at the point in question ran originally through the 1 ft. 4 in. seam; it is connected at various points with inclines leading into other seams, and, after passing through the 1 ft. 4 in. seam for a certain distance, it meets with a fault, the effect of which has been to bring the upper 2 ft. 4 in. seam down to the same level as the 1 ft. 4 in. seam, and from that point the road runs through the 2 ft. 4 in. seam. Now it is obvious, and it is admitted by the only expert witness whom I have heard, that the road in question would have been useless if it had been cut merely through the 1 ft. 4 in. or the 2 ft. 4 in. seam—that is to say, that if it had been merely of the height of 1 ft. 4 in. at one part of its passage and 2 ft. 4 in. at another part of its passage, it would have been useless for the purpose for which it has been made.

The conclusion, therefore, that I come to is that, inasmuch as "mines" unquestionably include not merely the bed of coal, but the workings of the coal, and the cavity after the coal has been removed, this road is part of the mine, and is, therefore, comprised in the reservation. Against that it is said that all the coal under this land has been worked out, and that since the working out the road has been enlarged. That it has been enlarged I consider to be proved, but that it has been enlarged for the purpose of conveying through it that foreign coal which, it is said, the defendants are now carrying through it there is no evidence at all. It has been enlarged, but my belief is that it has been enlarged in the ordinary course of events by the gradual falling-in of the roof, and the necessity of removing the debris either caused by pressure from above or, as sometimes happens, by pressure from below. That it has been deliberately enlarged for any purpose except as I have mentioned I have no evidence at all; the only fact that I have is that it has grown larger in recent times. In the absence of any evidence, I come to the conclusion, as I have already said, that it has been enlarged from necessary causes rendering it

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desirable or necessary for the working of the mine to keep that road clear and free from debris. Therefore, both on the law and on the facts, I come to the conclusion that this road is included in the exception.

The only point that then remains to be dealt with in that view of the case is the allegation of estoppel. Now the facts with regard to that are these. In the year 1822 a lease was granted by the predecessors in title of the plaintiff to certain persons who claimed to be the owners of the coal beneath the surface. I advisedly avoid the expression "predecessors in title of the defendants," for I know nothing about the devolution of title from that date. [His Lordship referred to the lease and stated the facts as to the payment of rent, and continued :—] The case made by the plaintiff is that by that payment of rent the defendants have admitted a tenancy in them of the road in question, and that they are not now entitled to set up their real title to this road.

Now, is that the law under the circumstances of this case? That the payment of rent in respect of a corporeal hereditament out of which a rent can issue may be an admission of tenancy and may estop the person who pays it during his tenancy is not, I think, disputed, but in my opinion it does not apply in the present case. The grant in 1822 was of certain privileges. That there may be a lease of a privilege—that is to say, that it may be granted for a term of years—is, I think, not doubted; but it is well settled that, except in the case of a lease by the Crown, no rent in the proper sense can issue out of incorporeal hereditaments. In my opinion, at law, the true effect of this deed was to grant to the persons who are named the right to use the privileges in question, the payment of rent being a personal contract on their part. If that is right the payment of rent during these years, as alleged in paragraph 10 of the statement of defence, is nothing more than a voluntary payment under a supposed legal obligation. I am putting it at the highest against the defendants. No authority has been cited, and I am satisfied that no authority can be produced in support of the proposition, that a voluntary payment made under a supposed legal liability creates in law any obligation at all, and I know

of no rule of law which would prevent me from giving effect to what I find to be the true rights of the parties under any supposed notion of estoppel, a doctrine to which it is not too much to say the Court will not resort except in the last extremity.

I consider myself, therefore, at liberty, notwithstanding that payment of rent, to give effect to what I find to be the true title of the defendants, and the result is that the plaintiff's action fails, and there must be judgment for the defendants with costs.

Solicitors: *R. B. Wheatly, Son & Daniel, for Cruttwell, Daniel & Cruttwells, Frome; Gribble, Oddie, Sinclair & Johnson, for Osborne, Ward, Vassall & Co., Bristol.*

H. C. R.

In re CYCLISTS' TOURING CLUB.

[No. 00381 of 1906.]

Company—Memorandum of Association—Alteration of Objects—Extension to New Business—Powers of Court—Companies (Memorandum of Association) Act, 1890 (53 & 54 *Vict.* c. 62), *s.* 1, *sub-s.* 5, *clauses* (*a*) *and* (*d*).

The alteration in the memorandum of association contemplated by s. 1, sub-s. 5, clause (*a*), of the Companies (Memorandum of Association) Act, 1890, is an alteration which will leave the business of the company substantially what it was before, with only such changes in the mode of conducting it as will enable it to be carried on more economically or more efficiently.

The memorandum of association of a club, incorporated as a limited company, stated that its objects were to promote, assist, and protect the use of bicycles, tricycles, and other similar vehicles on the public roads, to provide legal assistance for their riders in the enforcement of their rights to use the public roads; and to promote the comfort and safety of its members while touring on bicycles and tricycles by collecting and furnishing information, and in other ways. On an application by the club, under the provisions of the Companies (Memorandum of Association) Act, 1890, for the sanction of the Court to resolutions altering its memorandum of association by admitting to its membership all tourists, including motorists:—

Held, that the proposed alteration did not fall within either clause (*a*) or clause (*d*) of s. 1, sub-s. 5 of the Act, and ought not therefore to be sanctioned by the Court.

PETITION of the Cyclists' Touring Club under the Companies (Memorandum of Association) Act, 1890, for the sanction of the

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Court to resolutions which had been passed for the alteration of the club's memorandum of association.

The club was incorporated on September 28, 1887, under the Companies Act, 1862, as a limited company for purposes not of gain, and, pursuant to licence of the Board of Trade under s. 23 of the Companies Act, 1867, was registered with limited liability but without the inclusion in its name of the word "Limited."

By clause 3 of the memorandum of association the objects for which the club was established were stated to be (inter alia) the following:—

"1. To promote, assist, and protect the use of bicycles, tricycles, and other similar vehicles on the public roads.

"2. To provide legal assistance for the riders of bicycles, tricycles, and other similar vehicles in the enforcement of their rights to use the public roads.

"3. To promote the comfort and safety of its members while touring on bicycles and tricycles by collecting and furnishing the necessary information for the planning and conduct of cycling tours, and by publishing and supplying to its members road books, maps, periodicals, or newspapers, and by providing a suitable uniform and badge for any member at his or her cost, and by arranging for suitable hotel accommodation for its members at their own cost."

Article 57 of the articles of association provided that at general meetings of the club every member should have one vote, and that voting by proxy should not be permitted.

At extraordinary general meetings of the club, held respectively on September 14 and October 12, 1906, the following resolutions were passed and confirmed:—

"1. That the name of the club be changed, and that its name be henceforth 'The Touring Club.'

"2. That clause 3 of the memorandum of association be altered as follows:—

"(*a*) By substituting for the existing paragraph No. 1 the words—

'To promote, assist, and protect the pastime of touring by the use of vehicles or otherwise.'

"(*b*) By substituting for paragraph No. 2 the words—

'To provide legal assistance to tourists in protecting their rights and interests.'

"(*c*) By substituting for paragraph No. 3 the words—

'To promote the comfort and safety of its members while touring by collecting and furnishing the necessary information for the planning and conduct of tours, and by publishing and supplying to its members road books, maps, periodicals, or newspapers, and by providing a suitable uniform and badge for any member at his or her cost, and by arranging for suitable hotel accommodation for its members at their own cost.'"

The history of that alteration, so far as it is material for the purposes of the present report, is as follows: The council (which was a body of considerable numbers elected by the members of the club, polled according to certain regulations in their various districts) determined that it was desirable in the interests of the club to introduce this change, and at the ordinary general meeting of the club held on March 9, 1906, the matter was brought forward, and, after debate, the members present, by a majority of three—there being thirty-eight votes on the one side to thirty-five votes on the other—determined that the opinions of members should be ascertained by the circulation of voting papers. Voting papers were accordingly circulated, which were in these terms: 'The question asked of every member is, Are you in favour of steps being taken to broaden the basis of the club, so as to admit all tourists to membership? Answer 'Yes' or 'No.'" It was common ground that the main object and effect of the proposed alteration was not the admission, to the privileges of the club, of tourists on foot, or in horse-drawn vehicles (although they would be so admitted), but the admission of motorists. In the voting papers no mention was made of the suggestion that the principal object of the alteration was the admission of motorists. On that vote there were 10,443 answers in favour of the alteration, and 2214 answers against it, making altogether 12,657 votes. The total membership of the club was over 30,000. Therefore, roughly speaking, one-third of the total membership voted in favour of the change. Having obtained

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that vote, the council summoned the necessary meetings for the passing of the special resolutions. The first of those meetings was held at Newcastle on September 14, 1906. The result of that meeting was that 83 members, out of an entire membership of over 30,000, attended the meeting. Of those 83, 77 voted in favour of the proposed alteration, 1 voted against it, and 5 members abstained altogether from voting. The resolutions, therefore, were carried by a large majority at that first meeting. The confirmatory meeting was held in London. That meeting was attended by 368 members. Of those, on a show of hands, 210 voted in favour of the confirmation of the resolutions, 157 voted against, and 1 abstained from voting. A poll was demanded, and, on the poll, of the 210 who had voted in favour upon a show of hands, 173 only voted. The figures therefore were, on the poll, 173 for, and 156 against. The resolutions were therefore carried by a majority of less than 20.

On the hearing of the petition there was a conflict of evidence as to whether on the whole the alteration would be more in the interests of the club than to allow matters to remain as they were. In favour of the alteration it was said that the rapid growth of the practice of motoring had had a bad effect upon touring on bicycles and tricycles; that the use of the roads by motorists, especially the main roads, had rendered them so uncomfortable for cyclists that the practice of touring on cycles had very much fallen off, and, in consequence, the membership of the club had very much decreased; and that, whereas a few years ago the membership of the club was 60,000, it was now reduced to something over 32,000. It was further said that unless the alteration was made the revenues of the club would so diminish that the same privileges could not be afforded to cyclists as were previously afforded; but that if the membership was extended, the increased revenue would enable the same privileges as theretofore to be afforded to all members alike, cyclists, motorists, and tourists on foot, or in horse-drawn carriages, and possibly increased privileges. On the other side the evidence disputed that view of the circumstances, and those who opposed the alteration said that, in their opinion, if the alteration were not made, the revenues of the club, having regard

to its already accumulated funds, would be ample to provide such privileges as cyclists desired and might reasonably hope and expect from such a club.

Eve, K.C., and *A. R. Kirby*, in support of the petition. Upon the legal point it is submitted that the proposed alteration of the memorandum of association falls either within clause (*a*) of sub-s. 5 of s. 1 of the Act as enabling the club to carry on its business more efficiently, or within clause (*d*) of the same sub-section, as enabling it to carry on businesses which may conveniently and advantageously be combined with its own business, or within the two clauses combined.

Gore-Browne, K.C., and *T. Bateman Napier*, for dissentient members, were not called upon.

WARRINGTON J. stated the history of the alteration as above set forth, and, after discussing the evidence as to the merits of the proposed resolutions and as to whether the meetings were fairly representative, continued:—I have made these remarks about the evidence because it seems to me, upon the whole, that, even if I have power to confirm this alteration, I shall not be justified in doing it in the exercise of my discretion; partly because I cannot be satisfied that the alteration is in the interests of the members of the club generally, and therefore of the minority who oppose—and because by s. 1, sub-s. 4, of the Act I am bound to have regard to the rights and interests of the members of the company, that is to say, of all the members of the company—and partly because I do not think that I can accept the vote at the confirmatory meeting, or either of the two votes, as really expressing the views of the club as a whole. But be that as it may, the ground of the decision I am about to pronounce is that I do not think that the proposed alteration comes within the Act at all.

The section of the Act, which is well known, is sub-s. 5 of s. 1: "The Court may confirm, either wholly or in part, any such alteration as aforesaid with respect to the objects of the company if it appears that the alteration is required in order to enable the company—(*a*) to carry on its business more economically or more efficiently; or (*b*) to attain its main purpose by new or improved

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means; or (*c*) to enlarge or change the local area of its operations; or (*d*) to carry on some business or businesses which under existing circumstances may conveniently or advantageously be combined with the business of the company; or (*e*) to restrict or abandon any of the objects specified in the memorandum of association or deed of settlement." But clause (*e*) of course is out of the question.

It has been said by Mr. Eve that the alteration comes within either clause (*a*) or clause (*d*). First, with regard to clause (*a*), it is said that, by enlarging the membership of the club in the way proposed, it will be possible to carry on the business of the club as altered more economically or more efficiently. But with all respect to that argument, I do not think that it is sound. The alteration which is contemplated in that clause seems to me to be an alteration which will leave the business of the company substantially what it was before, with only such changes in the mode of conducting it as will enable it to be carried on more economically or more efficiently. But in the present case the proposed alteration would alter the business of the club completely. The business of the club at present is—reading again from the memorandum—to promote, assist, and protect the use of bicycles, tricycles, and other similar vehicles, on the public roads, and to provide certain privileges for those who tour on bicycles, tricycles, and other similar vehicles. That is the business which it seems to me is contemplated by clause (*a*), and it is impossible to say that that business will be conducted more economically or more efficiently if the proposed alteration is sanctioned. The business which will be conducted more economically or more efficiently is a business of catering for the privileges, and protecting the interests, not of the riders of bicycles and tricycles, but of tourists generally, and only incidentally, as part of that body, of the riders of bicycles and tricycles. It seems to me it cannot come under clause (*a*). Does it come under clause (*d*): "To carry on some business or businesses which under existing circumstances may conveniently or advantageously be combined with the business of the company"? Of course it may be said that you can separate touring on bicycles and touring in other ways, and that what it is

proposed to do is to combine, with the business of a club formed to promote the sport of bicycling, the business of a club formed to promote the sport of touring in motors. But that, as it seems to me, is not the true result of what is proposed. Having regard to the business of the club as at present, which is to cater for a particular class of tourists, it seems to me that you cannot properly say that what is proposed is a separate business of catering for another class of tourists. What is really proposed is to cater for the whole class of tourists, of which those for whom it now caters are only part. It seems to me that you cannot regard this as a proposal to combine a business of one kind with a business of another kind. It is really intended to enlarge the business which is now carried on by giving the privileges and the advantages of the carrying on of that business to a larger class of people.

But even assuming that that is wrong, and supposing that it is sought to combine the business of catering for tourists, other than those who tour on bicycles and tricycles, with the business of catering for those who tour on bicycles and tricycles, is it made out that the new business can conveniently or advantageously be combined with the business of the company? In my opinion that is not only not made out, but it seems to me that it is impossible to maintain that view in face of the affidavits which have been filed in support of the petition. The statement in the affidavit of the chairman of the council of the club in support of the petition is that touring on bicycles has gone out of favour chiefly on account of the introduction of motor cars, which, besides being more attractive in themselves, have to a great extent destroyed the pleasure of cycling, and have increased the risk of accident in the use of bicycles. It seems to me that one of the present objects of the club, namely, to protect bicyclists in their touring, would be to protect them against that very danger which the chairman has emphasized in the affidavit which he has filed. If the business of catering for motorists is combined with this, the club could only protect bicyclists against the dangers arising from motors by taking measures against another class of its own members; and it seems to me that the result would be that it would be impossible to combine (I am

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relying on the evidence filed in support of the petition) the business of catering for and protecting the rights and interests of motorists with the business of catering for and protecting the rights and interests on the roads of those who ride bicycles and tricycles.

On those grounds it seems to me that I must refuse the petition, and I must refuse it with costs.

Solicitors: *Hays, Schmettau & Dunn; T. L. Yates.*

W. I. C.

WARRINGTON J. 1906 *Dec.* 20.

In re GAME.
GAME *v.* TENNENT.

[1906 G. 2056.]

Married Woman—Restraint on Anticipation—Rule against Perpetuities—Severance of Class.

A testator directed his trustees to stand possessed of and invest a sum of 500*l.* and pay the income arising from such investment to his daughter S. S. during her life, and after her death upon trust for such child or children of the said S. S., or such child or children of a son or daughter of the said S. S. who should die before her as should if a son attain the age of twenty-one years, or if a daughter attain that age or marry; "and as to the share or shares of any girl or girls for her or their separate use, without power of disposing of the income or capital thereof otherwise than by will." S. S. survived the testator, and died leaving two married daughters who were born in the testator's lifetime:—

Held, that the restraint upon anticipation was severable and was valid as to the shares of the two daughters born in the testator's lifetime.

Herbert v. *Webster*, (1880) 15 Ch. D. 610, and *In re Ferneley's Trusts*, [1902] 1 Ch. 543, followed.

In re Ridley, (1879) 11 Ch. D. 645, not followed.

In re Russell, [1895] 2 Ch. 698, applied.

ORIGINATING SUMMONS.

George Game by his will dated December 2, 1869, after appointing trustees and executors thereof and making certain devises and bequests, directed his trustees immediately on his

decease to stand possessed of his shares in the Pacific Navigation Steam Packet Company, and also of a sum of 500*l.*, which sum of 500*l.*, he directed them to invest in Government or real securities in England, and pay the interest or income arising from such shares and investment to his daughter Sarah Shettle half-yearly during her life, and "after her death upon trust for such child or children of the said Sarah Shettle or such child or children of a son or daughter of the said Sarah Shettle who shall die before her as shall if a son attain the age of twenty-one years or if a daughter attain that age or marry the said fund to be divided equally between brothers and sisters but so that children of a deceased child of the said Sarah Shettle shall only take the share to which their parent would have been entitled had he or she survived the said Sarah Shettle and as to the share or shares of any girl or girls for her or their separate use without power of disposing of the income or capital thereof otherwise than by will."

The testator died on March 31, 1871.

Sarah Shettle died on March 21, 1906, having had three children, viz., a son, G. T. Shettle, and two daughters, Dorothy Elizabeth Tennent and Sarah Margaret Savory, both of whom were born in the testator's lifetime and were married.

The shares in the Pacific Navigation Steam Packet Company were disposed of by the testator in his lifetime.

The 500*l.* had been duly invested by the trustees and the income arising from the investments paid to Sarah Shettle down to her death.

This was an originating summons taken out by the present trustees of the will against the two daughters of Sarah Shettle for the determination of the questions—(1.) whether upon the true construction of the will a valid restraint was imposed upon the anticipation and alienation otherwise than by will of the income and capital of the one-third shares of the defendants, or either of them, in the said sum of 500*l.*, or in the investments representing the same; and (2.) whether the plaintiffs as trustees were justified in paying over to each of the defendants the corpus of her one-third share under the will in the said sum of 500*l.* or in the moneys for the time being representing the same.

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Henry T. Thomson, for the trustees. It would seem clear on the authorities that, if the testator had directed the trustees "to pay" this fund to the defendants, the restraint upon anticipation would have been held invalid, but where the words are "upon trust for" the cases are not so clear. The nearest case upon the point appears to be *In re Holmes*. (1)

[WARRINGTON J. There the words were "paid into her own hands."]

No doubt the Court is more ready to reject the restraint when the gift, as here, is one of a reversionary interest, because the lifetime of the tenant for life can be regarded as the period to which the restraint was intended to supply.

[WARRINGTON J. There is nothing here directing payment to these daughters.]

That is so, and there is this further point. The testator has said "otherwise than by will," and here there was nothing of which the defendants could have disposed by a will taking effect during the life of Sarah Shettle.

[WARRINGTON J. Contingent interests can be disposed of by will.]

Here the interests of the defendants would seem to be contingent, not only on their attaining twenty-one or marriage, but also on their surviving the tenant for life.

[He was stopped.]

W. H. Cozens-Hardy, for the defendants. On the question of construction the case is governed by *In re Bown*. (2) Previously to that decision a distinction had been drawn in the cases between an income-bearing fund and a share of cash not producing income, the restraint upon anticipation being held effectual in the former case and ineffectual in the latter. That distinction was overruled by *In re Bown* (2), and the principle there laid down was that the will must be looked at as a whole, and if it appears that the intention of the testator was that the fund should be paid to the married woman, the restraint upon anticipation will be disregarded. That principle was affirmed in *In re Holmes*. (1) Upon the construction of the present will it is submitted that the intention of the testator was to treat males and females exactly upon

(1) (1892) 67 L. T. 335. (2) (1884) 27 Ch. D. 411.

the same footing. The defendants are therefore entitled to have the corpus of their shares paid over to them, and the trustees are justified in making that payment.

But assuming that this construction is not correct, then it is submitted that the restraint upon anticipation is void as infringing the rule against perpetuities. The gift here is to a class, some of the members of which might not by possibility be born until after the expiration of the period limited by the rule. The whole restraint is therefore void. Apart from the decisions in *Herbert* v. *Webster* (1) and *In re Ferneley's Trusts* (2), it could not be contended that the class could be severed and the restraint confined to those members of it who were born in the testator's lifetime. In *In re Ridley* (3) the facts were precisely similar to those in the present case, and Jessel M.R. felt himself bound to hold, though with great reluctance, that the whole restraint was void.

[WARRINGTON J. In that case *Wilson* v. *Wilson* (4) was not cited to Jessel M.R., and the point that the class was severable was not taken. Here there are shares subject to a restraint. If the shares can be severed the restraint can also be severed.]

Wilson v. *Wilson* (4) was not a decision on restraint. The decision of Jessel M.R. in *In re Ridley* (3) should, it is submitted, be followed in preference to the decisions in *Herbert* v. *Webster* (1) and *In re Ferneley's Trusts*. (2)

[He also referred to *Cooper* v. *Laroche*. (5)]

[WARRINGTON J. referred to *In re Michael's Trusts*. (6)]

Henry T. Thomson, in reply. The question of severance was not raised in *In re Ridley*. (3) *Herbert* v. *Webster* (1) and *In re Ferneley's Trusts* (2) were followed by Joyce J. in *In re Millward*. (7) In *In re Russell* (8) a proviso for resettlement of shares of persons forming a class was construed as applicable to each share separately, and was confined to the shares of those members of the class who were born in the testator's lifetime.

(1) 15 Ch. D. 610.
(2) [1902] 1 Ch. 543.
(3) 11 Ch. D. 645.
(4) (1858) 28 L. J. (Ch.) 95; 4 Jur. (N.S.) 1076.
(5) (1881) 17 Ch. D. 368.
(6) (1877) 46 L J. (Ch.) 651.
(7) (1902) 87 L. T. 476.
(8) [1895] 2 Ch. 698.

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[WARRINGTON J. That decision seems to clinch the matter.]

[He also referred to *In re Teague's Settlement* (1), *In re Cunynghame's Settlement* (2), and Theobald on Wills, 6th ed., p. 584.]

WARRINGTON J. The question in this case is whether certain interests given under the testator's will to women who happen now to be married women are subject to a restraint upon anticipation. [His Lordship read the clause in the will above set forth, and continued:—] Both of the daughters of Sarah Shettle were born in the testator's lifetime, but of course the words of the gift are such that there would have to be included in the class children of Sarah Shettle or of children of Sarah Shettle who might have been born after the death of the testator. It is admitted that, if the gift had been confined to the children of Sarah Shettle born in the lifetime of the testator, the restraint upon anticipation would have been valid: what would have been the effect of that I will consider presently. But it is contended that, inasmuch as the class might have contained girls born after the death of the testator, and as the restraint upon disposition would have applied equally to the shares of children born after the death of the testator as to the shares of children born in the lifetime of the testator, the whole restraint upon disposition is therefore void, because, as is contended, you cannot sever the condition relating to those born within due limits from that relating to those born outside the limits. Is that objection a valid one?

I will deal with the matter first of all on principle, without reference to the authorities. We all know that if a fund is given on trust for a class, some of the members of which may by possibility attain vested interests in it after the period limited by the rule against perpetuities, the gift is void not only as regards them, but also as regards all the members of the class. The principle is that you cannot ascertain the share of any member of the class without taking into account the members born after the expiration of the legal period; the rights of all the members of the class would be affected by the consideration whether or not

(1) (1870) L. R. 10 Eq. 564. (2) (1871) L. R. 11 Eq. 324.

some of them were born within the legal period. But does that reasoning apply where the question is not as to the amount of the share or the period when the class is to be ascertained, but only as to a mere restriction which is to apply to each share as and when it comes into existence? The condition here is one which does not apply to the class as a whole, but only to the individual members of it. Upon principle, I do not see why such a condition should not apply where it can legally be applied and be rejected where it cannot.

Then as to the authorities. In favour of the view I have expressed there are three cases. The first is *Wilson* v. *Wilson* (1); the second is *Herbert* v. *Webster* (2); and the third is *In re Ferneley's Trusts*. (3) It will be convenient that I should describe what *Herbert* v. *Webster* (2) was. I think that case is directly in point, and that the question which Hall V.-C. had there to decide is exactly what I have to decide here. In that case there were some members of a class as to whom it was said that the restraint might be good if the limitation were severed, and some as to whom it would be invalid, and Hall V.-C. was of opinion that the restraint might be held to be valid as to those who were born within due limits, and that it would be rejected only as to those who were born outside those limits. On the other side reliance was placed on *In re Ridley* (4), which was decided before *Herbert* v. *Webster*. (2) The facts there were these: There, as here, there was a bequest of a fund in trust for A. for life, and after her death in trust for her children living at her death, and the issue then living of any child then dead in equal shares, the issue to take the parents' shares; any legatees, being females, to take for their sole and separate use without power of anticipation. A. survived the testator, and died leaving two married daughters who were born in the testator's lifetime (as to whom only the question arose). Jessel M.R. held that the restraint on anticipation was void as infringing the rule against perpetuities. It is obvious that the restraint would not have been void if the gift had originally been confined to the two daughters. It was void only

(1) 28 L. J. (Ch.) 95; 4 Jur. (N.S.) 1076.
(2) 15 Ch. D. 610.
(3) [1902] 1 Ch. 543.
(4) 11 Ch. D. 645.

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because it was a gift to individual members of a class some of whom might be born after the testator's death, and Jessel M.R., without considering whether it was possible to make a severance, held that the restraint was void. For some reason or other *Wilson* v. *Wilson* (1) was not called to his attention, and he was not asked to sever; it was assumed that it was impossible to sever the various shares. That being the state of the authorities at the time of the decision of Hall V.-C. in *Herbert* v. *Webster* (2), the matter came before Swinfen Eady J. in *In re Ferneley's Trusts.* (3) All the cases were cited to him, and, in particular, one to which I will presently refer, and he came to the conclusion that the rule followed by Hall V.-C. in *Herbert* v. *Webster* (2) was sounder than the view taken by Jessel M.R. in *In re Ridley* (4), and he followed it.

In that state of the authorities, if in my opinion the view adopted by Jessel M.R. in *In re Ridley* (4) ought to be preferred to the rule followed in *Herbert* v. *Webster* (2), I should be entitled to follow *In re Ridley* (4), notwithstanding *In re Ferneley's Trusts.* (3) But that is not my opinion. I think that the view by Hall V.-C. in *Herbert* v. *Webster* (2) is the sounder view, and I am glad to find that in a later case of *In re Russell* (5), where the question arose on an exactly analogous state of circumstances, it was held that a severance could be made. The facts there were these: A testator gave his residuary estate in trust, after the death of M. and her husband, for all the daughters of M. who should attain twenty-one, or marry under that age; with a proviso that the share of any daughter should be held upon trust for her for life, and after her death upon similar trusts for her children as were thereinbefore declared for the children of M. M. had one daughter only, the plaintiff, who attained twenty-one, and she was born in the lifetime of the testator. It was held by the Court of Appeal (affirming the decision of Chitty J.) that the proviso for settlement of the shares must be construed as applicable to each share separately; and that although it would have been void for remoteness in the case of daughters born after the death of the

(1) 28 L. J. (Ch.) 95; 4 Jur. (N.S.) 1076.
(2) 15 Ch. D. 610.
(3) [1902] 1 Ch. 543.
(4) 11 Ch. D. 645.
(5) [1895] 2 Ch. 698.

testator, it was valid in the case of the plaintiff, and therefore she was only entitled to a life interest in the fund. What, then, is the difference between an express provision that a share should be settled and a provision, as here, that the shares of married women should be for their separate use without power of disposing of the income or capital thereof otherwise than by will? In my opinion, for the purpose of the present question there is no difference. I think, therefore, that *In re Russell* (1) is an authority which is binding upon me in this case, though the circumstances there were somewhat different from those in this case. I hold, therefore, that, as to the two daughters born in the lifetime of the testator, the provision in the will that they should take without power of disposition otherwise than by will is valid and is not affected by the rule against perpetuities.

The second question on the summons is whether the restraint operates to prevent the two daughters receiving their shares of the fund. The will provides that after the death of Sarah Shettle the trustees should hold the fund "upon trust for such child or children of Sarah Shettle or such child or children of a son or daughter of the said Sarah Shettle who shall die before her as shall if a son attain the age of twenty-one years or if a daughter attain that age or marry the said fund to be divided equally between brothers and sisters but so that children of a deceased child of the said Sarah Shettle shall only take the share to which their parent would have been entitled had he or she survived the said Sarah Shettle." What is the real question I have to decide? That is, I think shewn by *In re Bown.* (2) The question is whether, on the true construction of this will as a whole, I am entitled to come to the conclusion that the testator intended that the trustees should hold the fund and not transfer it. How can I say consistently with what I have read that they can transfer the fund? Of course, if the daughters become widows, the fund can be transferred to them, because the restraint only applies to married women; but being, as they are, married women, and the restraint not infringing the rule against perpetuities, they are not entitled to anticipate either the principal or the income. I accordingly hold that the daughters

(1) [1895] 2 Ch. 698. (2) 27 Ch. D. 411.

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are not entitled to have the fund transferred to them and that they are restrained from anticipation.

Solicitors for all parties: *Snow, Fox & Higginson.*

W. I. C.

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In re A. L. P. DODSON.
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[1906 D. 1317.]

Revenue—Estate Duty—Incidence—Exercise of General Power of Appointment by Will—Appointed Fund—Residue—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 9, *sub-s.* 1.

Where a general power of appointment over a fund is exercised by will, the appointed fund does not pass to the executor "as such," and, consequently, the estate duty in respect thereof is payable out of the appointed fund in the absence of any direction in the will to the contrary.

In re Power, [1901] 2 Ch. 659, followed.

ORIGINATING SUMMONS.

John Dodson by his will dated September 17, 1884, bequeathed his residuary personal estate after the death of his wife (which event had happened) to trustees upon trust to pay certain annuities (some of which were still subsisting), and subject thereto upon trust to pay the annual income thereof to his son A. L. P. Dodson during his life, and after his decease as to a sum of 10,000*l.* upon trust to pay and transfer the same to the first person who should under the trusts thereinafter contained become absolutely entitled to the testator's real estates, and as to the remainder of the said personal estate in trust for such person or persons in such shares and proportions and generally in such manner in all respects as his said son A. L. P. Dodson should by will direct or appoint, with a gift over in default of appointment.

John Dodson died on April 23, 1890.

A. L. P. Dodson by his will dated November 7, 1893, and two codicils thereto dated respectively April 9, 1896, and April 23,

1900, in exercise of the power of appointment given to him by his father's will, appointed that the trustees thereof should after his decease stand possessed of the fund representing John Dodson's residuary personal estate (after providing for the 10,000*l.*) in trust to pay the income thereof to his wife Nora Georgina Dodson during her life, and from and after her decease he directed that the fund should be in trust for the person or persons who should at the decease of the survivor of himself and wife be in possession of the Littlesdale Hall estates, being the real estates devised by his father's will, and to be transferred to him, her or them accordingly at the decease of such survivor. And the testator devised and bequeathed to his wife all his own real and personal estate, and appointed her and W. H. Mellersh executors of his will and codicils.

Neither the will nor either of the codicils contained any directions for the payment by the executors of the debts or testamentary expenses; and it was admitted that A. L. P. Dodson's own estate was amply sufficient to meet them.

A. L. P. Dodson died on December 10, 1905, and his will and codicils were duly proved by his widow, who was still living, and W. H. Mellersh.

A. R. Dodson was the person entitled to the Littlesdale Hall estates contingently on his surviving A. L. P. Dodson's widow.

This was an originating summons taken out by the surviving trustee of John Dodson's will for the determination of the question (inter alia) whether the estate duty, which it was admitted was payable on the death of A. L. P. Dodson in respect of the fund over which he had exercised the power of appointment, was payable out of the appointed fund or out of A. L. P. Dodson's residuary estate.

A. Adams, for the summons.

Norton, K.C., and *Broke Freeman*, for the executors of A. L. P. Dodson's will. The question is whether the fund appointed by A. L. P. Dodson in exercise of the general power of appointment given him by his father's will is property which passes to the executor "as such" within the meaning of s. 9, sub-s. 1, of the

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Finance Act, 1894. That question is one upon which there have been several conflicting decisions. The question first arose before Kekewich J. in *In re Treasure* (1), who held that in such a case the property did not pass to the executor "as such," and therefore that estate duty was payable out of the appointed fund and not out of the testator's residuary estate. It arose again before the same learned Judge in *In re Maddock* (2), and he merely followed his previous decision. In *In re Moore* (3) the question came before Buckley J., who held that the estate duty was payable out of the testator's residuary estate. The matter then came before Byrne J. in *In re Power* (4), and he in a considered judgment followed *In re Treasure* (1); but Buckley J. in *In re Dixon* (5), where, however, the point did not arise for decision, expressed an opinion in favour of his former decision in *In re Moore*. (3) Finally the matter came before Swinfen Eady J. in *In re Fearnsides* (6), who adopted the view taken by Buckley J. In those circumstances the Court in the present case has to decide which of the two conflicting views it will adopt, and it is submitted that the view taken by Byrne J. in *In re Power* (4) is the correct one.

By the Finance Act, 1894, s. 9, sub-s. 1: "A rateable part of the estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable." By s. 22, sub-s. 1 (*d*), the expression "executor" includes an administrator. It is submitted, therefore, that property which would not pass to an administrator bears its own estate duty. But property over which a donee has exercised a general power of appointment by will cannot pass to an administrator, and therefore must bear its own estate duty. Moreover, an appointed fund does not pass to the executor "as such," but by virtue of the appointment. Property which passes to an executor "as such" is only such property as he is entitled to merely by producing the grant of probate; to such property an administrator would be equally entitled on production of letters of administration. If

(1) [1900] 2 Ch. 648.
(2) [1901] 2 Ch. 372.
(3) [1901] 1 Ch. 691.
(4) [1901] 2 Ch. 659.
(5) [1902] 1 Ch. 248.
(6) [1903] 1 Ch. 250.

the terms of the will have to be considered before it can be ascertained whether the executor is entitled to any particular property, that property does not pass to the executor "as such." To enable an executor to obtain an appointed fund it is not sufficient for him merely to produce the probate, but the will must be looked at to ascertain whether the power of appointment has been exercised. Therefore an appointed fund does not pass to an executor "as such."

[WARRINGTON J. referred to *In re Hoskin's Trusts* (1) and *In re Davies' Trusts.* (2)]

The cases of *Lord Townshend* v. *Windham* (3), the anonymous case there cited (4), and *Hayes* v. *Oatley* (5), which Buckley J. in *In re Dixon* (6) thought should be considered, are in no way inconsistent with the view that an executor takes the appointed fund as appointee and not as executor.

[They also referred to *Drake* v. *Attorney-General* (7) and *Platt* v. *Routh.* (8)]

H. Terrell, K.C., and *D. D. Robertson*, for A. R. Dodson. It is submitted that the estate duty is payable out of A. L. P. Dodson's residuary estate, and not out of the appointed fund. The question is whether under s. 9, sub-s. 1, property passing to the executor "as such" is to be confined to legal assets passing to the executor virtute officii. It is submitted that the sub-section ought to have a wide rather than a narrow construction given to it, and that it was not intended by it to draw a distinction between legal and equitable assets.

By the exercise of a general power of appointment a testator makes the appointed property his own, and the property so appointed is regarded as property bequeathed by him: *Beyfus* v. *Lawley.* (9) If the appointment is made to a stranger the executor, although he is not the appointee, is entitled to receive the appointed fund, and the only capacity in which he is so entitled is qua executor: *Lord Townshend* v. *Windham* (3); *In re Hoskin's Trusts* (1); *Hayes* v. *Oatley.* (5) The principal attribute

(1) (1877) 6 Ch. D. 281.
(2) (1871) L. R. 13 Eq. 163.
(3) (1750) 2 Ves. Sen. 1, 11.
(4) (1620) 2 Roll. Rep. 173.
(5) (1872) L. R. 14 Eq. 1.
(6) [1902] 1 Ch. 248, 257.
(7) (1843) 10 Cl. & F. 257.
(8) (1841) 3 Beav. 257.
(9) [1903] A. C. 411, 413.

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of an executor is to pay debts, and therefore all funds applicable by him as assets of the appointor come to him in his capacity of executor.

WARRINGTON J. The question in this case is whether estate duty which is payable in respect of a fund over which a testator has, and has exercised, a general power of appointment by will is to be borne by the appointed fund or by the testator's general estate; or, in other words, whether under s. 9, sub-s. 1, of the Finance Act, 1894, the fund is to be treated as "property which does not pass to the executor as such," so that a rateable part of the estate duty on the appointor's estate will be a first charge, and payable out of the appointed fund.

The question is one which has been the subject of several conflicting decisions, altogether six in number. Those decisions are two of Kekewich J.—namely, *In re Treasure* (1) and *In re Maddock* (2); one of Buckley J., namely, *In re Moore* (3); one of Byrne J., namely, *In re Power* (4); another decision of Buckley J., namely, *In re Dixon* (5); and, finally, one of Swinfen Eady J. namely, *In re Fearnsides.* (6) In these circumstances I have to express my own view. I have carefully read the judgment of Byrne J. in *In re Power* (4), and if I were going to give a judgment in detail I should merely repeat it. It seems to me his judgment is unanswerable. I think it better, rather than I should repeat it, that I should adopt it as my own. I hold, therefore, that the estate duty on the appointed fund is payable out of that fund.

Solicitors: *Bell, Brodrick & Gray, for Maxsted, Gibsons & Sturton, Lancaster; Peacock & Goddard, for Brydges, Mellersh & Mellersh, Cheltenham.*

(1) [1900] 2 Ch. 648.
(2) [1901] 2 Ch. 372.
(3) [1901] 1 Ch. 691.
(4) [1901] 2 Ch. 659.
(5) [1902] 1 Ch. 248.
(6) [1903] 1 Ch. 250.

W. I. C.

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Dec. 5, 6.

In re PIERCY.
WHITWHAM *v.* PIERCY.

[1888 P. 3082.]

Company — Return of Capital — Income or Capital — Tenant for Life and Remainderman—Special Resolution—Retrospective and Prospective Effect—Companies Act, 1880 (43 *Vict. c.* 19), *ss.* 3, 4, 5.

A testator gave his residuary real and personal estate to trustees upon trust for certain persons for life, with remainders over. His estate comprised fully-paid shares in the S. Company. In each year from 1894 to 1906, the company returned to its shareholders out of profits available for dividends a part of the capital paid up on their shares, increasing the unpaid capital by the same amount. These returns purported to be made under the Companies Act, 1880, but no special resolution was passed until 1905. In that year a special resolution was passed that 7*s.* 6*d.* per share should be so returned in that year, that all similar returns in past years should be confirmed, and that the directors should be authorized to make similar returns in the future :—

Held, that the special resolution was invalid so far as it purported to have a retrospective or prospective effect, and valid only so far as concerned the return made in 1905; and that the rule to be inferred from *Bouch* v. *Sproule*, (1887) 12 App. Cas. 385, and other cases is that a tenant for life is entitled to all payments made out of profits in respect of shares in a company except such as have been validly capitalized by the company. All the returns except the 7*s.* 6*d.* per share in 1905 were therefore payable as income to the tenants for life.

Benjamin Piercy, who died in March, 1888, by his will gave all his real and personal estate to trustees upon trust for sale and conversion, with a power to postpone conversion, and to stand possessed of his real and personal estate until conversion, and the surplus of the proceeds of conversion, after payment of debts, &c., and setting apart a certain proportion of the whole for charities, and of all his estate after conversion (therein referred to as his residuary estate), upon trusts under which several persons took interests for their respective lives, with remainders over.

The testator's estate was being administered in Court under the usual judgment.

Part of the testator's outstanding personal estate consisted of

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fifty fully-paid A or preferred shares of 10*l.* each in the Shone Drainage, Sewerage and Water Supply Company, Limited. On November 12, 1892, an order was made in the action giving the trustees leave to retain these shares until further order.

The company was incorporated in December, 1880, with a nominal capital of 50,000*l.*, divided into 5000 shares of 10*l.* each, of which 2875 were preferred shares. The assets of the company consisted chiefly of certain patents. The company had never paid any dividends upon their shares, but had in every year from 1894 to 1904 returned to the holders of preferred shares out of profits available for dividend various sums expressed to be paid on account and in reduction of share capital held by them in this company in accordance with resolutions passed at the preceding annual meeting of the company. The company treated these payments as reductions in the amount paid upon the shares, the amount unpaid upon each share and the liability of the shareholders being treated as increased to the same amount. The payments made in this way before 1905 amounted to 5*l.* 14*s.* 1*d.* per share. They purported to be made under the Companies Act, 1880, but no special resolution was passed by the company, as required by that Act, until the year 1905. The following special resolution was passed on August 17, and confirmed on September 6, 1905 :—

"(1.) That out of the accumulated undivided profits of the company there be now returned to each holder of A (or preferred) shares in the company the sum of 7*s.* 6*d.* per share, in reduction of the paid-up capital of the company, and to the intent that the unpaid capital may be increased by a like amount.

"(2.) That the returns heretofore made to each holder of A (or preferred) shares in the company, amounting altogether to 5*l.* 14*s.* 1*d.* per share, be and the same are hereby confirmed.

"(3.) That the directors be and they hereby are authorized at any time, and from time to time hereafter out of accumulated undivided profits of the company, to return to each holder of A (or preferred) shares in the company such sum or sums as the directors may think fit, in further reduction of the paid-up capital of the company, and to the intent that the unpaid capital of the company may be increased by a like amount."

The resolution went on to provide for the mutual rights of the preferred and deferred shareholders in a manner which did not affect the question raised by the summons.

The company had under its articles a general power to reduce capital. After the passing of the special resolution of 1905 a memorandum of the particulars required by law in case of a reduction of capital was duly registered, shewing the amount of paid-up capital as reduced and the amount of unpaid capital increased by the 5*l.* 14*s.* 1*d.* as well as the 7*s.* 6*d.* per share so retained as aforesaid. In the year 1906 the directors made a further return of 10*s.* per share. The trustees had received as returns on the shares held by them 285*l.* 4*s.* 2*d.* before 1905, 18*l.* 15*s.* in that year, and 25*l.* in 1906.

This summons was taken out by the trustees asking that they might be at liberty to appropriate to income of the testator's estate the sum of 310*l.* 4*s.* 2*d.*, being the whole of the repayments made in respect of the shares except the repayment of 7*s.* 6*d.* per share made in the year 1905, and expressly authorized by the resolution passed in that year. The question depended on the construction of ss. 3, 4, and 5 of the Companies Act, 1880. (1)

(1) The Companies Act, 1880 (43 Vict. c. 19): "3. When any company has accumulated a sum of undivided profits, which with the consent of the shareholders may be distributed among the shareholders in the form of a dividend or bonus, it shall be lawful for the company, by special resolution, to return the same, or any part thereof, to the shareholders in reduction of the paid-up capital of the company, the unpaid capital being thereby increased by a similar amount. The powers vested in the directors of making calls upon the shareholders in respect of moneys unpaid upon their shares shall extend to the amount of the unpaid capital as augmented by such reduction.

"4. No such special resolution as aforesaid shall take effect until a memorandum, shewing the particulars required by law in the case of a reduction of capital by order of the Court, shall have been produced to and registered by the Registrar of Joint Stock Companies.

"5. Upon any reduction of paid-up capital made in pursuance of this Act, it shall be lawful for any shareholder, or for any one or more of several joint shareholders, within one month after the passing of the special resolution for such reduction, to require the company to retain, and the company shall retain accordingly, the whole of the moneys actually paid upon the shares held by such person, either alone or jointly with any other person or persons, and which, in consequence of such reduction, would otherwise be returned to him or them." The

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F. Thompson, for the summons.

J. Henderson, for the tenants for life. The shares were not an investment authorized by the will for the investment of the proceeds of conversion, but they could have been retained under the power to postpone conversion, and the trustees were specially authorized to retain them by an order of the Court. The words of the will clearly give the tenants for life the income of all property which is properly retained until conversion. *Bouch* v. *Sproule* (1) shews that the question whether any payment on shares is capital or income, as between tenant for life and remainderman, depends upon what it really is as between the company and the shareholders. Here the resolution is clearly bad so far as it confirms past payments or authorizes future payments. These returns of capital were made out of profits, and the profits are income unless they have been validly turned into capital by the company.

Stirling, for the remaindermen. There is nothing in the Act to prevent the special resolution confirming payments retrospectively. If the resolution was valid, then the company have clearly turned these profits into capital: *Bouch* v. *Sproule*. (1) But, even if it were invalid, it certainly does not declare a dividend. The tenant for life of a share is not entitled to the profits, but only to such part of the profits as the company distributes by way of dividend. If the company retained the accumulated profits until the winding-up, they would clearly be capital. The result is the same if they pay them as capital to the shareholders properly or improperly. [He referred to *In re Hopkins' Trusts*. (2)]

George Lawrence, for the Attorney-General.

Dec. 6. NEVILLE J. In this case questions arise between tenants for life and remaindermen interested under the will of Mr. Benjamin Piercy as to who is entitled to the sum of 310*l.* 4*s.* 2*d.* received from the Shone Drainage, Sewerage and Water Supply Company,

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section goes on to provide that the money so retained shall be invested by the company as a security for the shareholder against future calls.

(1) 12 App. Cas. 385.

(2) (1874) L. R. 18 Eq. 696.

Limited and Reduced, as a return of part of the capital of fully-paid shares in the said company. With regard to the earlier of these payments, they were made without the passing of any special resolution. The payment was accompanied by memoranda, one of which, dated February 29, 1904, signed by the secretary and sent to one of the shareholders, I have before me. It is: "Dear Sir,—I enclose cheque value," so and so, "being in payment of 15*s.* 3*d.* per share on account and in reduction of share capital held by you in this company in accordance with the resolution passed at the annual meeting of the company held on the 25th instant." On September 6, 1905, a special resolution was passed in accordance with the provisions of the Companies Act, 1880, s. 3, in the following terms. [His Lordship read the resolution set out above.] With regard to the return made under the first part of the resolution no question arises. With regard to parts 2 and 3, confirming returns made in the past and authorizing future returns, it is contended that the resolution is invalid. This depends upon the construction of the Companies Act, 1880, ss. 3, 4, and 5. That s. 3 is not intended to enable a special resolution to be passed with prospective operation is, I think, shewn by the initial words of the section, "When any company has accumulated," and is emphasized by the provision in s. 5 giving any shareholder a right to require the company within one month after the passing of the special resolution to retain the moneys paid upon his shares. That it is not intended to have a retrospective effect is, I think, also indicated by the reference to an accumulated sum of undivided profits, and by the provisions of s. 5, having regard to the fact that the shareholders passing the resolution would not necessarily be the same as those to whom the return had been made, and, therefore, it might happen that either a shareholder might lose his right under this section, or the company might be compelled to retain the moneys paid although the return had been made to another person in respect of the same shares. Parts 2 and 3 of the special resolution are therefore, in my opinion, invalid, and the question arises whether the tenants for life are entitled to receive the amounts returned with which those parts of the resolution purport to deal. I think they are.

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The true rule to be inferred from the cases as between tenant for life and remainderman seems to me to be that the tenant for life is entitled to all payments out of profits made by the company unless they have been validly capitalized by the company by resolution or otherwise: see *Bouch* v. *Sproule* (1); *In re Hopkins' Trusts.* (2) The investment in question was one which had been properly retained by the trustees in conformity with their powers under the will and with the order of the Court, and the gift of the income runs as follows: "And to stand possessed of my residuary real and personal estate until conversion and the surplus of the said moneys and of all my estate after conversion thereof and which is herein referred to as my residuary estate upon trust to pay the income thereof as follows." Then certain benefits are conferred. I think, therefore, that upon its true construction that clause gives to the tenants for life the income of the testator's investments retained by the trustees.

There will be an order upon the summons to that effect.

Solicitors: *Field, Roscoe & Co., for Evan Morris & Co., Wrexham; Crowders, Vizard, Oldham & Co.; Solicitor to the Treasury.*

(1) 12 App. Cas. 385. (2) L. R. 18 Eq. 696.

J. R. B.

CROSBY *v.* ALHAMBRA COMPANY, LIMITED.

NEVILLE J.

1906

Dec. 20.

[1906 C. 3656.]

London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 5, *sub-s.* 29, 32; *ss.* 90, 173—*Party Wall*—*Statutory Notice by Building Owner*—"*Adjoining Owner*"—*Various Interests in adjoining Premises.*

The expression "adjoining owner" in s. 90 of the London Building Act, 1894, as defined by sub-ss. 29 and 32 of s. 5 of the Act, means every person holding an interest in the adjoining premises other than tenants from year to year or at will. A building owner, therefore, must serve his statutory notice under s. 90 upon every such person; except that, where a class of persons, such as joint tenants or tenants in common, are entitled to a particular interest in the adjoining premises, notice on one of the class will be sufficient.

List v. *Tharp*, [1897] 1 Ch. 260, discussed.

Motion.

The defendant company were the owners of the premises in Leicester Square known as the Alhambra Theatre. In 1901 the plaintiffs became lessees from the freeholders for a long term of years, of which some ninety years were unexpired, of all the premises immediately adjoining the south side of the Alhambra Theatre. The wall which separated the plaintiffs' premises from the defendants' premises was a party wall. The premises of the plaintiffs were known as Gloucester House, and comprised 28, Leicester Square, and 19, Charing Cross Road. In 1903 the plaintiffs sub-let all that part of 28, Leicester Square, which immediately adjoined the party wall, to the London County Council for a term of twenty-one years, and the Council were in possession and occupation of the premises so sub-let to them.

On May 24, 1906, the defendants, as building owners, served the Council with the usual statutory notice under s. 90 of the London Building Act, 1894, of their intention to cut into and bond to the party wall separating the theatre from 28, Leicester Square, for the purpose of carrying out some necessary alterations to the theatre, and they submitted plans of the proposed alterations to the Council, who approved them and consented

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to the alterations as adjoining owners. In October the defendants commenced the alterations, and proceeded with them. On November 24 the plaintiffs first heard of the defendants' operations, and, on being refused admission to the theatre to inspect the work, they issued the writ in this action on November 27, claiming an injunction to restrain the defendants from cutting away or taking down or interfering with any portion of the party wall, and on the same day they served the defendants with a notice of motion for an interlocutory order. On November 30 the motion came on for hearing, but stood over until to-day for argument, and was by consent treated as the trial of the action. At the date of the writ the defendants' alterations were almost completed.

Butcher, K.C., and *Austen-Cartmell*, for the plaintiffs. The plaintiffs are adjoining owners, and ought to have been served with the notice under s. 90 of the Act. The question turns on the definition of "owner" in s. 5, sub-ss. 29 and 32, of the Act. That definition includes two classes of persons, the landlord entitled to the rents and the tenant in possession, and both must be served with the notice: *List* v. *Tharp* (1); and by the Interpretation Act, 1889, words in the singular include the plural, so that the words "adjoining owner" in sub-s. 32 mean all the adjoining owners, and the words "one of the owners" do not cut down the adjoining owners to one individual, but probably refer to the case where several persons have the same interest.

Jenkins, K.C., and *Sargant*, for the defendants. Reading sub-s. 32 with s. 90, it is the adjoining owner or one of the adjoining owners that has to be served with the notice. The defendants have served one of the adjoining owners, and the owner they have served is the owner who is in possession of the adjoining premises, 28, Leicester Square, which immediately adjoin that portion of the party wall where the work is being done. *List* v. *Tharp* (1) is in our favour. It is not a decision on sub-s. 32, and the Court there was not asked to decide that every person interested in the adjoining premises, which would include the freeholder,

(1) [1897] 1 Ch. 260.

was an owner for the purpose of s. 90 and must be served. It decided that a tenant in possession for a term of years was the owner for the purposes of s. 90, and the defendants here have served the Council, who are the tenants in possession for a term of years. Before the Act of 1894 it was necessary under the Metropolitan Building Act, 1855, to serve every person interested in the premises: *Fillingham* v. *Wood.* (1) It is submitted that sub-s. 32 was introduced into the Act of 1894 to obviate the difficulty and necessity of giving the notice to everyone interested in the property, and that the true construction of sub-ss. 29 and 32 and s. 90, taken together, is that the person who is the owner for the purposes of s. 90 is the person who is really in possession or in receipt of the rack rents of the property.

Butcher, K.C., in reply, referred to s. 173 of the Act.

NEVILLE J. This case raises a point of some difficulty and importance under the London Building Act, 1894. The question is whether the owners of all the various interests in the premises which are bounded by a party structure are adjoining owners within the meaning and for the purposes of s. 90 of the Act, which provides for the service of two months' notice by the building owner on the "adjoining owner"; and we have to ascertain what is meant by "adjoining owner" by reference to s. 5, sub-ss. 29 and 32. Now, sub-s. 29 purports to give a definition of "owner." It says: "The expression 'owner' shall apply to every person in possession or receipt of the whole or of any part of the rents or profits of the land or tenement, or in the occupation of any land or tenement otherwise than as a tenant from year to year or for any less term or as a tenant at will." It has been argued on behalf of the defendants that that definition can only refer to one, or, at all events, two interests in the property, namely, either the interest of possession or the interest of the receipt of rents and profits; and that, although there may be one or several persons entitled to the receipt of the rents and profits, it is only to the receipt of rack or immediate rents and profits that the definition applies. I do not think that that is the true view. I think that every person who comes within that

(1) [1891] 1 Ch. 51.

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definition is, within the meaning of the sub-section, "an owner," and I am confirmed in that impression by the consideration that this sub-s. 29 purports to give a definition, not merely for the purpose of s. 90, but for the purposes of the whole Act. That is borne out by s. 173, which deals with the parties liable to contribute to the expenses under the Act, and I find that the word "owner" there has reference to persons entitled to successive rents, if I may use that term—that is, the persons entitled under different leases of the property. That being so, we turn to sub-s. 32, which says "The expression 'adjoining owner'"—which are the words which have to be interpreted in the present case—"means the owner or one of the owners." That must mean, of course, the owner or one of the owners defined by sub-s. 29, and it may mean either one of two things. It may mean any one of the persons who fulfil the definition given in sub-s. 29, or it may mean any one of a number of persons holding the same interest in the premises, such as joint tenants or tenants in common, so that you would not have to serve all such joint tenants or tenants in common, but only one of them. The question then arises whether the decision in *List* v. *Tharp* (1), which has been referred to, was really a decision on that point—that is to say, a decision upon the meaning of sub-s. 29 taken in conjunction with sub-s. 32. I think it was, because, putting the construction that I have upon sub-s. 29, it appears to me to be impossible to say that Sir Charles Oppenheimer, the long leaseholder in that case, was not an "owner" within the definition of sub-s. 29. Now upon Sir Charles Oppenheimer a notice had been duly served, and the proceedings under the Act duly followed as against him. He was a person entitled to a rent of some 500*l.* a year, issuing out of the premises, under an agreement which he had made with the plaintiff List that List should be granted a sub-lease after he had erected certain buildings on the premises. Now, if it was sufficient to serve any one of the persons coming within the definition of sub-s. 29, I take it Sir Charles Oppenheimer was one of those persons, and as notice had been duly served on him, the plaintiff List would have had no case, and would have had his action dismissed.

(1) [1897] 1 Ch. 260.

But Chitty J. held that the building owner could not proceed as against List notwithstanding the fact that he had served notice on Sir Charles Oppenheimer. In other words, it seems to me that the decision involves this, that notice both on Sir Charles Oppenheimer and on List was necessary in order to enable the building owner to proceed under s. 90 of the Act.

I hold, therefore, that the true interpretation of the two sub-sections is that all the persons coming within the definition of "owner" in sub-s. 29 must be served, except in the case where several persons hold, as tenants in common or as joint tenants, some particular interest in the land, in which case service on one of such tenants in common or joint tenants will be sufficient. As the motion is to be treated as the trial of the action, there will be a declaration that the defendants were not entitled to proceed with their building without giving the plaintiffs the usual statutory notice under s. 90 of the Act, and, the plaintiffs not now pressing for an injunction, there will be liberty to apply. The defendants must pay the costs of the motion and of the action.

Solicitors: *Mackrell, Maton & Co.; John Holmes, Son & Wigan.*

H. L. F.

PARKER J. 1906 Dec. 4, 13, 14.

LODGE *v.* NATIONAL UNION INVESTMENT COMPANY, LIMITED.

[1906 L. 1164.]

Money-lender — Registration — Contract of unregistered Money-lender — Void Transaction — Usury — Action to recover Securities — No Offer to repay Advances — Equitable Jurisdiction — Terms — Money-lenders Act, 1900 (63 & 64 *Vict. c.* 51), *s.* 2.

In an equitable action by a borrower to recover securities mortgaged to an unregistered money-lender the mortgagee will not be ordered to give up to the mortgagor the securities the subject of the mortgage except upon the terms that the mortgagor shall repay the money which has been advanced to him.

Quære, what would be the result of an action at common law for this purpose?

Authorities on the old usury law considered and applied.

The plaintiff Howitt Lodge was contingently entitled in reversion expectant on the death of his mother to certain stocks and securities. On March 2, 1905 he mortgaged this reversion to T. A. Greene to secure 750*l.* and interest at 10 per cent. In November, 1905, the plaintiff arranged with one Ernst, in whose employment he was, to raise as much money as he could on the security of his reversion with the object of taking shares in a company of which Ernst was manager. With a view to raising this money the plaintiff was introduced by his solicitors to the defendant company, the National Union Investment Company, Limited, who were money-lenders within the Money-lenders Act, 1900, but had not registered their name under that Act, or obtained an exemption from the Board of Trade. The defendants agreed to advance up to 2000*l.* Part of this sum was to be applied in paying off the mortgage to Greene, and the mortgage was to be transferred to the defendants. The transaction was ultimately carried through in the following manner: By an indenture of November 22, 1905, the plaintiff, in consideration of 1250*l.* expressed to be paid to him by the defendants, assigned his reversion to them. This deed was in form an absolute assignment

as on a sale, but subject to the mortgage to Greene. By another indenture of the same date the plaintiff, in consideration of 50*l.* said to be paid to him by them, assigned to the defendants a policy of assurance on his own life for 3000*l.*; and he covenanted to pay the premiums. This was also in form an absolute assignment; but the defendants admitted that, notwithstanding the form of the documents, the whole transaction was really one of mortgage. On the same day the plaintiff accepted two bills of exchange payable three months after date drawn upon him by the defendants for 1000*l.* and 250*l.* respectively. They retained certain sums for interest and commission, and paid over the remainder, viz., 1075*l.*, to the plaintiff's solicitors. On November 25, 1905, the plaintiff settled and signed the solicitors' account. In this they accounted for the whole sum of 1075*l.*, and shewed payments to the insurance company 17*l.* 15*s.*, stamps 5*l.* 17*s.*, cash paid to the plaintiff on account 40*l.*, cash paid to a Mr. Speed on the plaintiff's behalf 31*l.* 8*s.* 1*d.*, their own commission and costs as agreed 50*l.*, cash paid to the plaintiff 130*l.*, and cash paid to Mr. Ernst at the plaintiff's request 799*l.* 19*s.* 11*d.* At the trial it was held by his Lordship that the plaintiff had authorized the solicitors to make these payments.

The bills of exchange fell due in February, 1906, and were renewed for three months on payment of 150*l.* by the plaintiff to the defendants. The defendants paid off the money due on Greene's mortgage, and the mortgage and a policy of assurance on the plaintiff's life for 800*l.* held by Greene as further security were transferred to them on March 30, 1906.

On May 23, 1906, the plaintiff issued the writ in this action in the Chancery Division. In his statement of claim he pleaded that by reason of the defendants not being registered as money-lenders under the Money-lenders Act, 1900, the whole of the contracts and dealings between them and him were illegal and void; and he claimed—(1.) "A declaration that the said contracts and transactions are illegal and void as against him; (2.) Delivery up to him of the said assignments, bills of exchange and securities, including the said assignments of March 30, 1906; (3.) Repayment of the sum of 150*l.*" paid for renewing the bills; (4.) "Alternatively a declaration that the

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said assignments of November 22, 1905, are a mortgage; an account of what (if anything) is due from the plaintiff to the defendants in respect thereof and the right to redeem the property comprised therein; (5.) Such further or other relief as the case may require."

Kemp, *K.C.*, and *Edgar Foà*, for the plaintiff, submitted that he was entitled to the relief asked for by the statement of claim without repaying any of the money which had been advanced to him.

Romer, *K.C.*, and *George Henderson*, for the defendants. This is an equitable action, and the defendants will not be ordered to give up their securities except upon the terms that the plaintiff should repay the money he has received from them with legal interest. Sect. 1 of the Money-lenders Act, 1900, is not invoked in the present case. By s. 2, sub-s. 1 (*c*), it is provided that a money-lender "shall not enter into any agreement in the course of his business as a money-lender with respect to the advance and repayment of money, or take any security for money in the course of his business as a money-lender, otherwise than in his registered name." Sect. 3 provides for the registration of a "money-lender," a term which is defined by s. 6, and it is admitted that at the time of this transaction an exemption from registration had not been obtained under sub-clause (*e*) of that section. Sect. 2, sub-s. 1 (*c*), has been held to apply to an unregistered money-lender, with the result that such a person cannot make a valid agreement in his business as to the advance and repayment of money or taking security for it: *Victorian Daylesford Syndicate* v. *Dott.* (1) There Buckley J. says that "a contract which is prohibited, whether expressly or by implication, by a statute is illegal and cannot be enforced. . . . For this purpose statutes may be grouped under two heads—those in which a penalty is imposed against doing an act for the purposes only of the protection of the revenue, and those in which a penalty is imposed upon an act not merely for revenue purposes, but also for the protection of the public." Then he holds that "the whole

(1) [1905] 2 Ch. 624, 629.

purpose" of this Act "is the protection of the public." An appeal from that case was brought and dismissed without argument (1), as the Court of Appeal had already approved of the decision of Buckley J. in *Bonnard* v. *Dott.* (2) It was there held that, as the statutory prohibition was for the benefit of the borrower, the borrower could recover his securities from the money-lender. The point now before the Court was referred to by Collins M.R., who says: "The borrower, being one of the class which the Act was presumably designed to protect, ... can compel the lender to return the securities for the loan, at any rate on the terms of repaying the amount lent."

We submit that the plaintiff in the present case can obtain the return of his securities only upon the terms of repaying the money lent. There is no decision to this effect on the Act of 1900, but we crave in aid the decisions on the Usury Acts, which, like the Act of 1900, were passed for the protection of a particular class. No doubt the general rule at law was that, when the plaintiff could not get at the money which he sought to recover without shewing the illegal contract, the rule potior est conditio possidentis applied; but there were exceptions to the rule, one of which was that of a class protected by statute—as borrowers under the Usury Acts—in which case one might recover from the other notwithstanding that both had been parties to the contract: *Kearley* v. *Thomson.* (3)

In the Court of Chancery the rule was that a borrower seeking equity must do equity, and accordingly a demurrer was allowed to a bill claiming delivery up of an usurious security, but containing no offer to repay the advance with legal interest: *Mason* v. *Gardiner.* (4) The relief against usurious contracts in Courts of law is stated as follows in Comyn on the Law of Usury, p. 207: "That a party, who is called upon to perform his usurious agreement, may shield himself under the statute, has been already seen. If, however, he does not choose to wait the attack of his adversary, but desires at once to free himself from all apprehension of danger, the Courts of law afford him a ready sanctuary. And not only will they prevent his future distresses,

(1) [1906] 1 Ch. 747, n.
(2) [1906] 1 Ch. 740, 745.
(3) (1890) 24 Q. B. D. 742, 745.
(4) (1793) 4 Bro. C. C. 436.

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but will even restore to him all his losses, and compel the usurer to refund those profits, which he has unlawfully accepted from the borrower. While, however, the Courts protect the borrower, they will be careful to observe, that when he seeks relief, he does not himself become the oppressor. Before he can appeal to their equitable jurisdiction, he must prove himself worthy their protection, by performing all that equity requires at his hands; and, therefore, he cannot demand their assistance against his creditor, till he has put him in the same situation as he stood before the bargain, by returning the principal really borrowed, together with lawful interest." After referring to *Fitzroy* v. *Gwillim* (1), the learned author cites *Hindle* v. *O'Brien* (2), in which the Court of Common Pleas refused to set aside a judgment which had been obtained on an usurious contract except on the equitable terms of making the applicant repay the principal and legal interest.

In Comyn on Usury, p. 212, the relief given in equity is stated as follows: "As at law, so in equity, a party applying for relief against an usurious contract must himself do all that is equitable; and the rule is, not to make void the whole debt, but the party applying must submit to pay what is really due: for the Court does not relieve against an usurious contract, to make a man lose his principal as well as interest." He also quotes *Ex parte Scrivener* (3), in which Lord Eldon L.C. said: "In equity you cannot come for relief without offering to pay what is really due."

[They also referred to Story's Equity Jurisprudence, ss. 300, 301.]

Kemp, K.C., in reply. The plaintiff is entitled to the relief which he seeks and no terms can be imposed upon him. The Court cannot in this action directly order the plaintiff to pay anything to the defendants; the most it can do is to make the payment a condition of his getting back the deeds. *Victorian Daylesford Syndicate* v. *Dott* (4) and *Bonnard* v. *Dott* (5) contain statements of legal principles which directly apply to this

(1) (1786) 1 T. R. 153.
(2) (1809) 1 Taunt. 413.
(3) (1814) 3 V. & B. 14.
(4) [1905] 2 Ch. 624.
(5) [1906] 1 Ch. 740, 746.

point. The Court will not by a side wind give an unregistered money-lender rights which he cannot enforce himself. In the latter case Romer L.J. says that an unregistered money-lender has no rights.

The old authorities relating to appeals to the equitable jurisdiction of the Court in usurious transactions do not affect this question. This is merely an action in detinue for documents handed over to the defendants. They are admittedly unregistered money-lenders, and have no locus standi. There is no distinction at law between a man who has in fact no lien and a man who has a lien which the law says is not to be enforced. This is an ordinary common law action, and the defendants cannot set up in answer to it a mortgage which cannot be enforced. *Mason* v. *Gardiner* (1), *Fitzroy* v. *Gwillim* (2), *Hindle* v. *O'Brien* (3), and *Ex parte Scrivener* (4) were founded on the equitable jurisdiction of the Court, and do not apply.

[PARKER J. An action for money had and received is an equitable action: *Moses* v. *Macferlan* (5); *Bradford Corporation* v. *Ferrand.* (6)]

It is settled that in actions such as this, where a transaction is void, the Court will not impose terms: *Roberts* v. *Goff* (7), *Tregoning* v. *Attenborough* (8), and *Hargreaves* v. *Hutchinson* (9), in which *Hindle* v. *O'Brien* (3) was overruled. The statement of law quoted from Comyn on Usury, p. 207, is founded on *Fitzroy* v. *Gwillim* (2), which is overruled by *Roberts* v. *Goff* (7), *Hargreaves* v. *Hutchinson* (9), *Wood* v. *Grimwood* (10), and by *Flight* v. *Reed.* (11) This is analogous to the case of a marriage brokage contract. It has been held that money paid under such a contract can be recovered back by the person who paid it, although the other party has performed his part of the contract and incurred expense in so doing: *Hermann* v. *Charlesworth.* (12) These deeds and documents can be the subject of an action in detinue. They were obtained from us by an illegal contract, and

(1) 4 Bro. C. C. 436.
(2) 1 T. R. 153.
(3) 1 Taunt. 413.
(4) 3 V. & B. 14.
(5) (1760) 2 Burr. 1005, 1012.
(6) [1902] 2 Ch. 655, 662.
(7) (1820) 4 B. & Al. 92.
(8) (1830) 7 Bing. 97.
(9) (1834) 2 Ad. & E. 12.
(10) (1830) 10 B. & C. 679.
(11) (1863) 1 H. & C. 703, 717.
(12) [1905] 2 K. B. 123.

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we are not obliged to prove that we have property in them. We are entitled to recover them unconditionally. We are only put into this position because the defendants did not admit until the trial that they were money-lenders. The Court will not allow that to affect the result. This question is not within the enactment that rules of equity are to prevail. At all events, we are entitled to recover the 150*l.* paid for the renewal of the bills.

Romer, K.C., replied on the cases cited for the plaintiff.

PARKER J. stated the facts, and proceeded:—The defendants are now admitted to have been money-lenders within the meaning of the Money-lenders Act, 1900. At the date of the transactions I have referred to they had not registered themselves under that Act, nor had they obtained any order from the Board of Trade exempting them from such registration. It follows that on the authority of *Victorian Daylesford Syndicate* v. *Dott* (1) and *Bonnard* v. *Dott* (2) the loan transactions above referred to are void for illegality. The usual rule is that in the case of a transaction void for illegality neither party can take any proceedings against the other party for the restoration of any property or for the repayment of any money which has been transferred or paid in the course of the illegal transaction. To this rule, however, there are exceptions, one of them being in favour of the persons for whose protection the illegality of the contract has been created, and in the authorities I have mentioned it has been held that in the case of loan transactions void under the Act of 1900 the borrower is within that exception. The illegality of the transaction, therefore, does not preclude the plaintiff from maintaining this action. The defendants, however, maintain that, this being an appeal to the equitable jurisdiction of the Court, the plaintiff can be put upon terms and not allowed to assert any equity unless he himself is prepared to do equity by repaying the 1075*l.* less the 150*l.* paid for the privilege of renewing the bills, and certain sums which they are willing to allow him to deduct which I need not refer to in detail. In support of this contention the

(1) [1905] 2 Ch. 624. (2) [1906] 1 Ch. 740.

defendants referred to the decisions of the Court relating to transactions void under the old usury laws. On reference to the statutes dealing with usury it will be found that usurious contracts were made illegal and a penalty imposed in much the same way as is done with regard to loan transactions prohibited by the Money-lenders Act, 1900. I refer in particular to the statutes 12 Car. 2, c. 13, and 12 Anne, stat. 2, c. 16. I think, therefore, I shall be justified in treating the decisions under those statutes against usury as authorities for what I ought to do in the analogous cases which arise under the Act of 1900. It seems reasonably clear that at any rate in equity, if not also at law, a person taking advantage of the exception arising from the fact that he belonged to the class for whose protection the statutes were passed could not assert any right unless he was himself prepared to do what the Court considered fair to the defendant. On this ground the Lord Chancellor in *Mason* v. *Gardiner* (1) allowed a demurrer to a bill asking for delivery up of an usurious security, the bill containing no offer to repay what had been advanced or the legal interest. And there is another case of *Scott* v. *Nesbit* (2) which is to the like effect. It is by no means so clear what the Courts of common law would have done in such a case, but even at law the plaintiff has sometimes been put upon terms. In the case of *Fitzroy* v. *Gwillim* (3) a pawner brought an action in trover against a pawnbroker with whom she had pledged goods to secure an advance with illegal interest. She was non-suited by Lord Mansfield C.J. on the ground that the parties were in pari delicto, and that the rule potior est conditio possidentis ought to prevail. In other words, Lord Mansfield did not allow her to rely on the exception arising from the fact that she was one of the class of persons protected by the statutes. There was a motion to set aside the non-suit. Counsel argued that the plaintiff "in order to recover had only to shew a title in herself, a possession in the defendant, and a tender for the warehouse room. The defence set up to this was an usurious contract, which, if it were allowed, would entirely defeat all the statutes against usury." The argument, therefore,

(1) 4 Bro. C. C. 436. (2) (1789) 2 Bro. C. C. 641.
(3) 1 T. R. 153, 154.

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was that there was no need for the plaintiff to rely on any exception, but that she could recover in trover without setting up any contract open to illegality. Upon this motion Lord Mansfield said: "This is an equitable action brought by the plaintiff in order to be relieved from an usurious contract. She must come therefore with clean hands, according to the principle laid down in the case of *Bosanquet* v. *Dashwood* (1), that those who seek equity must do equity. It was there determined that a Court of Equity would afford relief in such cases upon payment of principal and interest. A lender upon an usurious contract is precluded from recovering anything upon such contract; but if the borrower seek relief, he must first do what is right as between the parties. Here the plaintiff did not tender what had been actually advanced, and cannot therefore have the benefit of this equitable action"; and Buller J. said: "It is the plaintiff who discloses and relies on the usurious contract in this case, in order to take advantage of it. The borrower brings the action. It is enough for the defendants to say that the goods were pawned by the plaintiff. Then the plaintiff in answer is obliged to shew an agreement, by which she is entitled to have these goods returned to her on payment of certain interest, which is usurious on the face of it, and which she is desirous of setting aside; but she has done nothing to entitle herself to the relief she claims." In other words, the argument put forward by counsel is negatived by the learned judges who heard the motion. They say that it is necessary in an action of trover for the plaintiff to put forward the contract and rely on the illegality; and, further, to rely on the exception enabling him to bring the action notwithstanding the illegality. As I understand it, this decision amounts to this, that anyone who seeks relief either at law or in equity and for the purpose of that relief is obliged to set up an illegal contract, and rely on the exception arising by reason of his being within the protection of the statute imposing the illegality, is in fact bringing an equitable action, and will therefore be put on terms with regard to the relief granted.

This case of *Fitzroy* v. *Gwillim* (2) has been doubted on many

(1) (1734) Cas. t. Tal. 38. (2) 1 T. R. 153.

occasions if not actually overruled. In *Hargreaves* v. *Hutchinson* (1), which also was an action in trover by a pawner against a pawnbroker, the Court refused to impose any terms, and treated the case of *Fitzroy* v. *Gwillim* (2) as a very questionable authority; and again in *Tregoning* v. *Attenborough* (3), which was also an action in trover by a pawner against a pawnbroker, *Fitzroy* v. *Gwillim* (2) was dissented from on the ground that trover was a question of strict legal right. Tindal C.J., in an interlocutory observation, distinguishes it from an action for money had and received, which he says was undoubtedly an equitable action. I think it is possible, although it is not very clear on the reports, that their real reason for differing from *Fitzroy* v. *Gwillim* (2) was that the plaintiff in an action of trover really relies upon his property in, or a superior right to possession of, the goods he seeks to recover; and in order to shew that right it is not necessary for him in any way to mention the illegal contract. When a pawnbroker defends such an action he can only do so by shewing in himself some special right of property negativing the right of the plaintiff. It is not apparent how the defendant in any action in trover founded on facts analogous to those in *Fitzroy* v. *Gwillim* (2), could prove a property in the goods without reliance on the contract of pledge under which he had obtained the goods; and if on proof of that contract it appeared to be an illegal contract under which he could acquire no such right of property, he would have no defence to an action of trover. Even though *Fitzroy* v. *Gwillim* (2) be treated as overruled, it is nevertheless possible that the principle applied in that case may be properly applied in cases where the plaintiff at law cannot succeed in an action such as trover or detinue without himself setting up a contract which is open to objection on the ground of illegality; and the moment he sets up that contract, in order to sue at all he must rely on the exception to the general rule, and it may be right to put him on equitable terms.

There is a case of *Hindle* v. *O'Brien* (4), where there was a motion in the Court of Common Pleas to set aside a judgment

(1) 2 Ad. & E. 12.
(2) 1 T. R. 153.
(3) 7 Bing. 97.
(4) 1 Taunt. 413.

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which had been given upon an usurious contract on the ground that the contract was illegal, and this was stated by the Court to be an application to the equitable jurisdiction of the Court; and on that ground the applicant was put on terms which were terms such as a Court of Equity would impose. There is another case of *Roberts* v. *Goff* (1), the facts of which were, I think, on all fours with those of *Hindle* v. *O'Brien*. (2) There the Court of King's Bench refused to put the applicant on any terms at all. *Hindle* v. *O'Brien* (2) was cited, and the Court said that the construction and practice of that Court had always been different from that of the Common Pleas; and added that they had "reason to know that some of the learned persons who argued that case in the Common Pleas, were not, at the time, at all satisfied with the decision." Of course I am not considering an analogous case, and have not to make up my mind whether I should follow the principle laid down in the Common Pleas or that of the King's Bench. I may observe, however, that the decision of the Common Pleas is nearer to the principle applied in Courts of Equity than that of the King's Bench.

In this state of the authorities it is difficult to say what would be the result if the plaintiff were suing in detinue or trover. I have considerable doubt whether an action of detinue or trover would lie at all with respect to the bills of exchange or the two conveyances of November 22, 1905. I do not see how there was ever in the plaintiff any property or right to possession with respect to these documents. I think, however, that with regard to the policy of insurance which was delivered over under the conveyance of November 22, it belonged to the plaintiff, and with respect to that policy he might have maintained an action of detinue. Supposing, however, that he could have maintained an action in detinue for that, and also for the other documents he seeks to recover, I am of opinion that he could not succeed without setting up the illegal contract, and for this reason: Supposing he had brought his action in trover or detinue founded on property or possession, the defendant would immediately set up the conveyances, which are in form absolute conveyances, and it would be only in the reply

(1) 4 B. & Al. 92. (2) 1 Taunt. 413.

that the fact of the illegality of the contract need be stated. In this respect it would differ from the cases on trover which have been referred to. In my judgment, however, with the possible exception of the payment of the 150*l.*, the whole of this action is put forward as an equitable claim, and not as a legal claim. The statement of claim is not framed with reference to any right in trover or detinue; it is framed with reference to the relief to which the plaintiff would be entitled in equity. Under these circumstances, although I have dealt with the legal argument which has been put forward, I do not think it necessary to pronounce any opinion on that point. I can decide this case on the ground that, with the exception of the 150*l.*, it is an equitable action and apply the principles laid down in *Mason* v. *Gardiner*. (1) With regard, however, to the 150*l.*, that may be a claim in an ordinary common law action for money had and received. Is that an action of strict law, bearing in mind the expressions used in *Tregoning* v. *Attenborough* (2) and in *Fitzroy* v. *Gwillim* (3), or is it an equitable action?

There is a case of *Moses* v. *Macferlan* (4), where Lord Mansfield said: "This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, ex æquo et bono, the defendant ought to refund: it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honor and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the Statute of Limitations, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or, for money fairly lost at play; because in all these cases, the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express or implied); or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those

(1) 4 Bro. C. C. 436.
(2) 7 Bing. 97.
(3) 1 T. R. 153.
(4) 2 Burr. 1005, 1012.

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circumstances. In one word the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."

That I understand to be assented to by Tindal C.J. in *Tregoning* v. *Attenborough* (1), which Farwell J. in *Bradford Corporation* v. *Ferrand* (2) referred to without any dissent, and indeed with approbation. I do not think it is either æquum or bonum that the plaintiff, who has had the benefit of the 1075*l.* and who is relying on the illegality of the contract and the exception enabling him to sue notwithstanding such illegality, should have relief without being put on terms by which both parties may be restored to the positions they occupied before the transaction commenced. I propose to make an order to the following effect: Upon payment by the plaintiff to the defendants by March 1, 1907, of the 1075*l.* (less the 150*l.* paid for the renewal of the bills, and the sums of 50*l.* and 5*l.* 17*s.* mentioned in the account, which the defendants agree to give up) and the premiums on the 3000*l.* policy paid by the defendants, let the defendants deliver up to the plaintiff the bills of exchange and the conveyances of November 22, 1905, and the 3000*l.* policy. In default of the plaintiff making these payments, the action will be dismissed, except so far as it relates to the mortgage to Greene. It is not disputed that the defendants are entitled to the benefit of that security, and in that respect the plaintiff will have the usual redemption decree. There will be no order as to costs, except that on redemption the defendants will have the usual mortgagee's costs.

Solicitors: *Thorp & Saunders; Morris & Co.*

(1) 7 Bing. 97. (2) [1902] 2 Ch. 655, 662.

H. C. R.

PARKER J.
1907
Jan. 16.

In re GRANGE.
CHADWICK *v.* GRANGE.

[1906 G. 1484.]

Mortgage—Sale—Surplus Proceeds of Sale—Trust in Favour of Mortgagor, his Heirs or Assigns—Conversion—Realty or Personalty—Lunacy of Mortgagor.

The trust of surplus proceeds of sale in a mortgage deed provided that they should be paid to the mortgagor, "his heirs or assigns." The property was sold in 1900 under a power of sale contained in the mortgage, and there was a considerable surplus. The mortgagor was a lunatic not so found by inquisition for some time before the sale, and continued in that condition until his death in 1906 intestate and without having been married:—

Held, that the surplus proceeds of sale must be treated as personalty notwithstanding the language of the trust.

By an indenture of August 25, 1871, J. B. T. Gascoigne and J. Wardman, at the request of Thomas Grange and Joseph Grange, conveyed lands at Bilton-with-Harrogate, in the county of York, to C. Walton by way of mortgage to secure 1000*l.* advanced by Walton to Thomas and Joseph Grange. A power of sale over the lands in question was conferred upon Walton, his executors, administrators and assigns, in default of payment, and it was further provided "that the said C. Walton his executors administrators or assigns shall with and out of the monies to arise from any such sale as aforesaid in the first place pay and retain the costs and expenses attending such sales or otherwise in relation to this security and in the next place pay and satisfy the monies which shall then be owing upon the security of these presents and shall pay the surplus (if any) to the said Thomas Grange and Joseph Grange and their respective heirs or assigns in equal moieties."

Thomas Grange died in 1899. The mortgagee sold the mortgaged property in June, 1900, under the power of sale. After payment of the debt and costs there remained a considerable surplus payable to Thomas and Joseph Grange, or their

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representatives, in equal moieties, and one-half of this surplus was paid to the representatives of Thomas Grange.

Since the year 1883 Joseph Grange had been a lunatic not so found by inquisition and confined as a pauper lunatic in the West Riding Asylum, where he remained until he died intestate, and without having been married, in January, 1906. After the sale the interest on his share of the surplus proceeds of sale was paid to the county authorities for his maintenance, and the fund now amounted to about 855*l.*, with interest from the date of his death. A dispute arose whether this fund ought to be treated as realty or personalty. Letters of administration to the estate of Joseph Grange were granted to one of his sisters, and she took out this summons to determine the question.

A. H. Poyser, for the heir-at-law. In equity Joseph Grange's share of the surplus proceeds of sale has never been personalty. There was never any conversion from realty into personalty. The rule is that where mortgaged property is sold after the mortgagor's death there is no conversion. It is true that this sale took place in his lifetime, and if he had been of sound mind the surplus would now be treated prima facie as personalty. Conversion depends on the intention of the mortgagor, and it is assumed, when the sale takes place in his lifetime and he dies afterwards, that he has elected to take the surplus in the condition in which it is found at his death: *Wheldale* v. *Partridge*. (1) Lunacy operates in the same way as death, and prevents the mortgagor from exercising any intention to convert: *Wright* v. *Rose*. (2) Therefore Joseph Grange never elected to take this fund as personalty, and it is still realty. The mere act of selling the property does not shew conclusively that there has been conversion: *In re Bird*. (3) This is not a question of reconversion into realty. There has been no conversion into personalty. The mortgage deed contains an indication of the intention of the mortgagors that there should be no conversion, for the surplus proceeds of sale are to be paid to the mortgagors, their "heirs

(1) (1803) 8 Ves. 227, 235. (2) (1825) 2 S. & S. 323.
(3) [1892] 1 Ch. 279.

or assigns": *In re Underwood* (1); *Jones* v. *Davies*. (2) It is expressly provided by s. 123 of the Lunacy Act, 1890, that sales by the committee of a lunatic under the powers of the Act are not to alter the nature of the property.

W. S. Sherrington, for the next-of-kin. The property was converted into personalty by the sale, and there has been no reconversion. The form of the trust of the surplus in the mortgage deed has no effect on this question: *In re Smith's Mortgage Account* (3); Davidson's Precedents in Conveyancing, 4th ed. vol. ii. part 2, pp. 83—85. The surplus passes to the personal representative of the mortgagor where the sale has taken place in his lifetime: Fisher on Mortgages, 5th ed. p. 462; *Wright* v. *Rose*. (4) Sales under the lunacy jurisdiction have no bearing on the present case.

W. H. Cozens-Hardy, for Joseph Grange's administratrix. There is no equity in favour of the heir-at-law to reconvert that which has in fact been converted during the mortgagor's lifetime: *Steed* v. *Preece*. (5)

A. H. Poyser, in reply.

PARKER J. stated the facts, and proceeded:—There seems to have been some hesitation amongst conveyancers as to the proper form of the trust of surplus proceeds of sale. At times one finds that surplus proceeds are expressed to be payable to the mortgagor, his heirs or assigns; at other times to the mortgagor, his executors, administrators or assigns; and there are forms where both those two prior forms are combined, and the surplus is expressed to be payable to the mortgagor, his heirs, executors, administrators or assigns. As between the heir-at-law and the next-of-kin of a deceased person, prima facie they are respectively bound by the condition of the property at the time of the deceased's death. What is then actually personalty goes to the next-of-kin, and what is actually realty goes to the heir-at-law. Of course, where there has been a notional conversion in equity, what is in fact realty may be in equity

(1) (1857) 3 K. & J. 745.
(2) (1878) 8 Ch. D. 205.
(3) (1861) 7 Jur. (N.S.) 903.
(4) 2 S. & S. 323.
(5) (1874) L. R. 18 Eq. 192, 197.

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personalty, and what is in fact personalty may be in equity realty. But that does not alter the principle, because in that case in a Court of Equity money is considered as realty, and realty is considered as personalty, for the purpose of the descent or devolution of the property. It is necessary in the present case for the heir-at-law to say that the money in question, which was actually personalty, was in equity realty, so as to descend upon him, and the way in which he endeavours to make out that is simply by reference to the form of the trust of surplus proceeds of sale in the mortgage deed.

In my opinion that trust does not operate to impress upon the surplus proceeds of sale a notional conversion into realty. The words used are merely words put in to prevent it being argued, as it has been argued in some cases, that the use of such words as "executors and administrators" prevents the mortgage from being a mortgage simpliciter, and enables it to be treated as in fact a settlement altering the devolution of the property. They are not put in, in my opinion, with the object of saying that the proceeds of sale, notwithstanding the sale, shall still remain realty for the purpose of devolution. And, even if they were put in for that purpose, I very much doubt whether they would have the effect alleged.

The decisions shew that in order to have a notional conversion, either of realty into personalty or of personalty into realty, there must be an imperative direction that the property shall be converted, and I very much doubt whether, if it were intended to keep the proceeds of sale as notionally realty, it would not have been necessary to put in some trust for reinvestment in real estate. Several cases have been quoted in support of the argument of the heir-at-law, but I do not think that those cases really have much bearing upon the question. *In re Bird* (1) was adduced as an authority for the proposition that a mere sale does not operate as a conversion. I do not think it can be used as an authority for any such proposition. In that case there was a power of sale in a settlement of real estate, and the proceeds of sale might be invested, with the consent of the tenant for life, in realty. There was also an interim power of investment in personalty. The trustee sold the property, and

(1) [1892] 1 Ch. 279.

the proceeds were not reinvested in realty, but were kept as personalty and invested in Consols under the interim investment clause. The tenant for life gave no consent one way or another. It was held that the proceeds of sale, during the period when they were invested under the interim investment clause, had not lost their character of realty, and were descendible as realty. In *Wright* v. *Rose* (1) the trust of the ultimate proceeds of the sale was for the mortgagor, his executors or administrators, and it was held that, notwithstanding those words, the proceeds of sale, inasmuch as the sale took place after the mortgagor's death, were payable not to his executors or administrators, but to his heir. So that that really is not a case which bears upon this point. Again, *In re Underwood* (2) is a totally different case, for there, in form at any rate, there was no power of sale, but an absolute trust for sale arising upon default. An absolute trust for sale arising upon default may, possibly, be construed as a power for sale, and not as converting a property: but in that case it was held that the deed was not a mortgage simpliciter, but was, besides being a mortgage, a settlement, as it were, of the property in a certain line of descent; and that, inasmuch as the ultimate proceeds of sale were to be held in trust for the mortgagor, his executors, administrators or assigns, there had been a conversion of the property in equity notwithstanding the trust for sale had not been exercised. I do not think any other case was quoted to me which has any direct bearing on the subject.

The only other point is whether any difference arises because this gentleman was a lunatic from a period antecedent to the sale down to the date of his death. I do not think that that makes any difference. Even in the case of lunacy, the heir-at-law and next-of-kin must take the property as it is at the death of the deceased, and there is, as between them, no equity to have it converted one way or another. As long as the sale takes place properly under a proper authority it must be taken as operating to convert the property into personalty, just as a purchase of land under a proper authority would convert the property into realty; and the fact of the lunacy per se makes no difference. I declare, therefore, that in this case the property

(1) 2 S. & S. 323. (2) 3 K. & J. 745.

PARKER J. 1907 GRANGE, *In re.* CHADWICK *v.* GRANGE.

belongs to the legal personal representative of the deceased mortgagor as part of his personal estate.

Solicitors: *W. Stubbs, for Hirst & Capes, Harrogate; Helder, Roberts, Walton & Giles, for E. H. Coates, Wetherby; Halse, Trustram & Co., for Arnold Muir Wilson, Sheffield.*

H. C. R.

PARKER J. 1907 *Jan.* 18, 19.

SADGROVE *v.* BRYDEN.

[1906 S. 4312.]

Company—Meeting of Shareholders—Voting—Proxy—Date of Meeting uncertain—Blanks in Proxy—Authority to fill up Blanks—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 80.

Provided a proxy be stamped with a penny stamp on execution, the date of execution and the date of the meeting at which it is to be used may be filled in afterwards by any person duly authorized by the giver of the proxy to do so; even though at the time of execution the date of the meeting has not been fixed.

Motion by E. J. Sadgrove (on behalf of himself and all other shareholders of the defendant company, the Patentwood Keg Syndicate, Limited, except the defendants and their supporters) for an order restraining the defendants, A. B. Bryden, F. G. Fedden, W. K. Smith and L. Roworth, until the trial, from acting as directors of the company and from carrying into effect resolutions which had been passed on November 13, 1906, or from withdrawing a retainer which had been given to a firm of solicitors to act for the company in an action of *The Patentwood Keg Syndicate* v. *Pearse*, or from discontinuing that action, or from doing anything to prevent that action from being duly prosecuted and disposed of on the merits.

That action had been commenced in March, 1906, by the company against Messrs. Pearse, Baker and Fisher, who had been promoters of and vendors to the company, with the object of making them account for secret profits alleged to have been made by them in the course of the promotion.

On September 6, 1906, the vendors served on the directors a

requisition calling upon them to convene an extraordinary general meeting of the company for the object of passing—(1.) a resolution approving of the affixing of the seal of the company to a deed releasing the vendors from the claims of the company; (2.) a resolution that the meeting disapproved of the action of *The Patentwood Keg Syndicate* v. *Pearse;* (3.) that the meeting prescribed as a regulation that the directors should take steps to discontinue the action; (4.) that the number of directors should be increased; and (5.) that Messrs. Bryden, Fedden, Smith and Roworth should be appointed directors.

A doubt arose whether the requisition had been properly served, so a fresh one in similar terms was served on October 8, 1906. The meeting was held on November 13, and the resolutions were carried by 2022 votes to 1541. Mr. Shaw, a holder of 518 shares, who was in America, had given to Mr. Pearse a proxy form in favour of the resolutions, stamped with a penny stamp and signed by him, but omitting the date of execution and the date when the meeting was to be held. On September 26, 1906, Mr. Pearse wrote to Mr. Shaw that "a further requisition has been lodged with the company requiring the directors to convene a meeting of the company with the object of passing resolutions (inter alia) to effect the discontinuance of the action brought by the company in the High Court against the vendors and promoters (*Patentwood Keg Syndicate* v. *Pearse*, 1906 P. 586), and of appointing A. B. Bryden, F. G. Fedden, L. Roworth and W. K. Smith to be additional directors of the company. The date upon which this meeting will be held has not yet been fixed, but as a shareholder due notice will be given you. As you are aware, I hold a proxy form in blank signed by you, and I shall be obliged if you will on receipt of this letter cable me 'consent,' which I will take as your authority for the purpose of completing the proxy in my favour as soon as the date upon which the meeting will be held is known. I am sorry to be again obliged to trouble you in this matter, but I am advised that this authority is necessary to enable me to vote on your behalf." Mr. Shaw on October 5 sent to Mr. Pearse a cablegram as follows: "Consent, Shaw." After the present action was commenced this cablegram was stamped with a 10*s.*

PARKER J. 1907 SADGROVE v. BRYDEN.

stamp as a power of attorney. Mr. Pearse filled in the dates in the proxy and used it at the meeting, thus obtaining a majority of votes.

Mr. Sadgrove objected to this proxy on the ground that the dates had been irregularly filled in by Mr. Pearse, and commenced proceedings against the additional directors and the company. The other questions which arose on the motion do not call for a report.

Gore-Browne, K.C., and *T. Ribton*, for the motion. The blanks in Mr. Shaw's proxy were improperly filled up, and it is invalid. Assuming that his cablegram was a sufficient authority, it only authorized Mr. Pearse to insert the date of the meeting to be held in accordance with the first requisition. It did not authorize him to complete the proxy for use at the meeting of November 13, which was called in response to the second requisition.

Even if the filling up of the proxy was sufficiently authorized, it is void under the Stamp Act, 1891. It was not given for any specified meeting, but at large, without any date of a meeting. A shareholder cannot go abroad and leave a stamped proxy here and authorize somebody to fill it up and use it when any meeting is called. Sect. 80, sub-s. 1, says that every letter appointing a proxy to vote at a meeting hereby "charged with the duty of one penny, is to specify the day upon which the meeting at which it is intended to be used is to be held, and is to be available only at the meeting so specified, and any adjournment thereof." The time must be specified when the proxy is given. Without that date it is void, and it cannot be validated by a subsequent insertion of the date. In *Ernest* v. *Loma Gold Mines, Ld.* (1) it was held that proxies were good although the date of the meeting at which they were to be used was left blank and afterwards filled up by the secretary of the company. But in that case the date of the meeting was fixed, and it was omitted by mistake. Here the date of the meeting was not fixed, and in fact no meeting might have been held. There cannot be an authority to fill in an uncertain date. A proxy to be used at the next election is invalid: *Reg.* v. *M'Inerney* (2); Alpe on Stamp

(1) [1896] 2 Ch. 572; [1897] 1 Ch. 1. (2) (1891) 30 L. R. Ir. 49.

Duties, 9th ed. p. 153. A proxy can only be used at one particular meeting and any adjournment of that meeting. For larger purposes a power of attorney is necessary: *In re English, Scottish and Australian Chartered Bank.* (1)

Buckmaster, K.C., and *Sheldon*, for the defendants. The proxy was valid. It has been decided that a proxy is not void simply because the date of the meeting at which it is to be used is omitted and is inserted afterwards. It need not be filled up at the time of execution. The Stamp Act, 1891, only requires that the blank shall be filled up before the proxy is used: *Ernest* v. *Loma Gold Mines, Ld.* (2) It is of no consequence to the revenue when or for what purpose the meeting is held. A penny stamp is all that is necessary, and the proxy must only be used for one meeting. Under the Stamp Act, 1891, a proxy can be used without even being stamped, provided it is afterwards stamped with a 10*s.* stamp as a power of attorney. The words "available for any purpose whatever" in s. 14, sub-s. 4, refer to use as evidence in a Court of law. At any rate, any defect has been cured in this case, for the cablegram has been stamped as a power of attorney. We do not admit that that was necessary to the validity of the proxy, but it was done after consultation with the authorities at Somerset House, without penalty under s. 15, and to avoid trouble. Mr. Shaw knew all about the meeting, and intended his proxy to be used as Mr. Pearse used it.

Gore-Browne, K.C., in reply.

PARKER J. stated the facts, and continued:—Notwithstanding the withdrawal of the requisition referred to in Mr. Pearse's letter, I am satisfied that Mr. Shaw intended to authorize the proxy to be filled in and used at the meeting intended to be called for the purposes specified in the letter, whether such meeting was actually called pursuant to the requisition lodged as mentioned in the letter, or to a subsequent requisition substituted therefor.

But it is nevertheless said that the proxy was bad under the Stamp Act. I think, however, that the case is really governed by the decision in *Ernest* v. *Loma Gold Mines, Ld.* (2) The

(1) [1893] 3 Ch. 385, 401, 411. (2) [1896] 2 Ch. 572; [1897] 1 Ch. 1.

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only distinction that is suggested is that here, when the proxy was signed, the date of the meeting, or possibly whether there would or would not be a meeting at all, was undetermined; whereas in the last-mentioned case the date of the meeting was actually fixed when the proxy was signed. I do not think that there is any real substance in this distinction. The Stamp Act no doubt precludes stamping such a proxy after execution, but so long as it is properly stamped at execution, its operative parts, for example the name of the proxy, or the date of the meeting at which the proxy is to be used, may be filled in afterwards by any person properly authorized so to do.

I am of opinion, therefore, that the first ground, on which it is contended that the resolutions are invalid, fails.

Solicitors: *Woodbridge & Sons; Swepstone & Stone.*

H. C. R.

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HENRY LEETHAM & SONS, LIMITED *v.* JOHNSTONE-WHITE.

[1906 H. 3419.]

Covenant in restraint of Trade—Construction—Master and Servant—Combination of Firms—Separate Businesses—Engagement by Agent on behalf of Combination—Reasonableness—Injunction.

Decision of Neville J. (ante, p. 189) reversed on the construction of the particular agreement in restraint of trade.

APPEAL from Neville J.

The question raised by this appeal was the validity of an agreement in restraint of trade entered into with the employee by an agent on behalf of a combination of firms. As the agreement in question is set out in detail in the report of the case in the Court below (1), where the facts and evidence are also fully stated, the following summary is considered sufficient to make the arguments and judgments intelligible.

By an agreement of September 18, 1905, between S. Leetham (called the master) of the one part, and the defendant (called the

(1) Ante, p. 189.

servant) of the other part, after reciting that the master was a director of the plaintiff company (described as wheat and corn millers and called the principal company) and of five other named companies (called the subsidiary companies), and that the master was entering into the agreement as the agent for and on behalf of the principal and subsidiary companies, the master thereby engaged the servant to serve the principal company or one of the subsidiary companies in such capacity as the master should from time to time direct at a salary payable monthly; and it was thereby agreed (clause 4) that the servant would not within the area of the United Kingdom of Great Britain and Ireland enter the service of any other wheat or corn miller or either directly or indirectly engage in selling or dealing in flour or any other article or goods dealt in or manufactured by the principal or subsidiary companies within five years from the expiration of his engagement with either the principal or any or either of the subsidiary companies, without the written consent of the principal company; and (clause 7) that all restrictions and conditions contained in the agreement should be construed as if they were made in separate agreements entered into by the servant with the principal and each of the subsidiary companies, and might be put in force by any one of them in whose actual service the servant had been at any time during the continuance of the agreement.

The defendant was employed under this agreement by the Cleveland Flour Mills, Limited, one of the subsidiary companies, as a traveller for them in the counties of Northumberland, Durham, and York, where the bulk of their business was carried on, until December, 1905, when they dismissed him. The defendant subsequently entered the service of a firm of flour millers at Grimsby, and travelled for them in the districts of Norwich, Yarmouth, and Lowestoft. The principal and subsidiary companies and S. Leetham thereupon commenced this action, and moved for an interim injunction in the terms of clause 4 of the agreement. There was evidence that the combined businesses of the principal and subsidiary companies covered substantially the whole area of the United Kingdom and Ireland. Each company, however, carried on a separate

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business, and had its own staff of servants and travellers, but the directors of the principal company were represented by a majority on the board of each of the subsidiary companies, and had a controlling influence in each of them.

Neville J. held on the evidence that the whole of the United Kingdom of Great Britain and Ireland was within the trading area of the plaintiffs, and therefore that clause 4 was not wider than was reasonably necessary for the protection of their trade; and he accordingly granted an injunction as asked.

The defendant appealed.

Jenkins, K.C., and *F. M. Preston*, for the appellant. The agreement does not make the defendant the servant of all the companies; he is to enter the service of any particular company selected by S. Leetham, and by his direction he enters the service of the Cleveland Company, and the proper construction of this agreement, having regard to clause 7, is that it is a separate contract entered into by the defendant with the particular company in whose actual employment he has been. If this is the correct construction, then the business of the Cleveland Company alone is to be considered, and for this purpose it is clear that the area of restriction is wider than is reasonably necessary for the protection of this particular business, and therefore the covenant is void.

Bramwell Davis, K.C., and *J. M. Gover*, for the respondents. This is an agreement with the principal and all the subsidiary companies; it is not improper for a number of companies or firms, all carrying on a similar business, to combine together and employ a traveller, and to bind him down in such a way that when he leaves their employment he may not interfere with the business of his employers. The agreement was entered into for the protection of all these companies, who have a joint interest in these various businesses.

[BUCKLEY L.J. The fact that these companies have a common management and are interested in each other's businesses seems to me to have nothing to do with this case; we have to construe this agreement.]

On the evidence this restriction is absolutely necessary for

the protection of the businesses of these companies, and under the circumstances of this case the limit of space prescribed is not wider than is "reasonably necessary" for the protection of the covenantee": *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (1) As a question of construction this is not an agreement with the Cleveland Company alone. It is an agreement with the agent of all these companies for the joint protection of the combined businesses; and, looked at from this point of view, the area is not too wide.

FARWELL L.J. It is obvious that the learned judge in the Court below very unwillingly came to the conclusion that the law was most unreasonable, and that it compelled him to adopt the arguments that we have heard from counsel for the respondents. If we were indeed bound to adopt those arguments, I think the law would be very unreasonable, but I am glad to think that that is not so.

The contract in this case is in a somewhat unusual form. One Sidney Leetham (called the master) purports to contract on behalf of a company (Henry Leetham & Sons, Limited, which is a very large company), and also on behalf of a number of so-called subsidiary companies, with the defendant for his services, and the engagement was that the defendant (called the servant) should "serve the principal company or one of the subsidiary companies in the capacity or sphere as the master shall from time to time appoint and the servant hereby agrees to serve the principal company or one of the subsidiary companies in such capacities upon the terms following," amongst them being clause 4, which it is now sought to enforce. [Having read clause 4, his Lordship continued:—]

The particular subsidiary company, whose servant the defendant became, was the Cleveland Company. Before I consider the position of that company, I will also refer to clause 7 of the contract. [His Lordship read it, and continued:—] Taking clause 7 and the rest of the contract together, I think it is intended to be one contract with the individual company, with whom the defendant actually enters into relation with as servant,

(1) [1894] A. C. 535.

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for service with that company so long as that engagement continues. It may very well be that hereafter the defendant might have been changed over to another company. Whether that would have been a sufficient contract or not does not matter; I will leave that for further consideration by some other Court if the question ever arises.

I think the true effect of the whole contract is that this is a contract between the servant and the Cleveland Company alone, the Cleveland Company engaging by its agent the individual who is a party to the contract.

The business of the Cleveland Company, as appears from the affidavits, is a small one, and is confined to two or three of the northern counties; it has no business in Scotland or Wales, and only a little business in Belfast. It appears to me on the evidence that it is quite plain that, regarded as a contract for the protection of the Cleveland Company alone, clause 4 is manifestly unreasonable as being far wider than can possibly be required for the protection of that company. But it is argued that the true meaning is this, that the contract is entered into by the individual on behalf of a great number of companies, and it is said that the contract should be regarded as one for the protection, not of the Cleveland Company, whose servant the defendant became, but of all or any of the Cleveland Company or the companies, one of whom has indeed a very large business. It seems to me that such a contract is contrary to the very principle on which these contracts are allowed to be effected, notwithstanding that they are in restraint of trade, and therefore against public policy. The Courts have gone on the footing that an individual who is dealing with a business which he has built up by his own exertions is entitled to protect that business so as to enhance its value, but a contract restraining trade is only good if and so far as it is for the protection of that business. For instance, it has been decided in *Horner* v. *Graves* (1) that you cannot have a covenant in gross—that is to say, a man who has no interest in the business at all cannot take a covenant from a man that he will not enter into that particular business; it does not concern him, and it is against public policy, because it restricts

(1) (1831) 7 Bing. 735.

trading in the United Kingdom. In the same way it follows, to my mind, that a man whose business is a corn miller's business, and who requires to protect that, cannot, if he has also a furniture business, require the covenantee who enters into his service as an employee in the corn business to enter into covenants restricting him from entering into competition with him in the furniture business also, because it is not required for the protection of the corn business in which the man is employed, however much it may be beneficial to the individual person the owner both of the corn business and of the furniture business.

It seems to me to follow from the decision of the Court of Appeal in *Jacoby* v. *Whitmore* (1), applied by me in *Townsend* v. *Jarman* (2), that on the sale of a business with a goodwill, although nothing more is said, the benefit of the restrictive covenant passes with the business, because it is not for the benefit of the individual, but it is for the benefit of the business. That being so, I think the learned judge did injustice to the law in saying that it acted as harshly as he considered, and that this action fails and the motion is misconceived, and the order should be discharged with costs.

BUCKLEY L.J. In this case the agreement of September 18, 1905, was made between Mr. Sidney Leetham and the defendant. The agreement by its recitals expresses Mr. Leetham to enter into it as agent for a principal company and five subsidiary companies, and it goes on to recite an agreement between the master and the servant to enter into the agreement thereinafter contained for regulating the service of the servant with either the principal company or one of the subsidiary companies. The testatum then is that the master engages the servant to serve the principal company or one of the subsidiary companies; I leave out the rest of the agreement for the moment. It is a fact, but in my opinion an irrelevant fact, that before the date of this agreement the servant was in the employment of Henry Leetham & Sons, Limited. Under the agreement the only service he ever entered was that of the Cleveland Flour Mills, Limited. At the date of the agreement he was in point of fact serving them under

(1) (1883) 49 L. T. 335. (2) [1900] 2 Ch. 698.

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Leetham's directions; he continued in that employment from September to November, 1905, and on November 30, 1905, he received a month's notice of dismissal. The operation of the agreement, therefore, is this, that the servant being bound to serve the principal company or one of the subsidiary companies as the master directed him, served the Cleveland Company and nobody else. The limits of the business of the Cleveland Company are described in paragraph 8 of defendant's affidavit. I do not pause to read it. The substance of it is that it was confined to certain comparatively small portions of England, there was no business at all in Scotland or in Wales, and there was nothing more than a selling agent in Belfast. The area over which the servant is prohibited from trading is the area of the United Kingdom of Great Britain and Ireland. Upon the facts it is indisputable that that is a larger area than is required for the protection of the business of the Cleveland Company. The plaintiffs in this action are not the Cleveland Company, but all the six companies, and they sue the defendant for an injunction to restrain him from trading within the forbidden area of the United Kingdom of Great Britain and Ireland. There is no room for dispute that if the business of the Cleveland Company only is to be protected, that is too wide, and, if the protection is too wide, the restriction is void.

It is sought to support it by saying that it is not too wide if regard is to be had to the area over which the businesses of the other companies extend, and I think on the evidence that that is so.

Is there any justification for an injunction in that state of facts? In my opinion there plainly is not. The Cleveland Company, whose service alone he entered, was a company whose business did not require protection over such an area as the agreement provided for. Let me test it in this way: Suppose the only plaintiffs in this action were Henry Leetham & Sons, Limited, could they recover? Plainly not. There has never been any agreement at all between the defendant and Henry Leetham & Sons, Limited. There would have been if the master had required him to go into their service; but he never did, and Henry Leetham & Sons, Limited, never could have sued upon

this covenant. If they had a cause of action, inasmuch as their business was so extensive as it is, the agreement would not have been too wide: but they could not have sued; the only people who could sue were the Cleveland Company. It seems to me that that is quite plain. There is a clause in the agreement which makes it, if anything more were needed, plainer still; that is clause 7, which has already been read. I think that clause means that you are to treat this as if there were six agreements, and that any company in whose actual service the servant has been may enforce the hypothetical separate agreement with that company, containing, as it will, the restrictions and conditions contained in this agreement. Now, if I write out that separate agreement it will be a separate agreement between the Cleveland Company and the defendant that the defendant will not trade within an area in excess of that which is required for the protection of the Cleveland Company. That restriction is bad. I am unable to follow the reasoning by which Neville J. came to the conclusion that it was his duty to enforce this covenant. I think the covenant is too large, and is therefore void, and that consequently this appeal must be allowed.

Solicitors: *Griffith & Gardiner, for R. Newbold Kay, York; Norris, Allens & Chapman, for North, Kirk & Co., Liverpool.*

W. C. D.

C. A.
1907
Jan. 30;
Feb. 4, 5.

In re LACEY.
HOWARD *v.* LIGHTFOOT.

[1905 L. 1439.]

Administration—Specialty Debt—Mortgagor—Covenant—Real Assets—Specific Devisees—Payment of Interest by one Devisee—Testator's General Estate—Acknowledgment—Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57), *s.* 8.

Payment of interest by the specific devisee of part of a testator's real estate, which was subject to a mortgage created by the testator, is sufficient to keep the mortgagee's right of action alive against the specific devisees of other parts of the real estate which was not subject to the mortgage, and thus entitle the mortgagee to an order for administration of the whole of the testator's real estate.

The principles laid down in *Roddam* v. *Morley*, (1857) 1 De G. & J. 1, applied.

Bradshaw v. *Widdrington*, [1902] 2 Ch. 430, discussed.

The question raised by this appeal was whether payment of interest by the specific devisee of one part of a testator's real estate, which was subject to a mortgage, would prevent the statute from running in favour of the specific devisee of another part of the testator's real estate, which was not subject to this mortgage, so as to entitle the mortgagee to enforce his claim for any deficiency in his original security against the latter estate. The facts, so far as material for the purposes of this report, were as follows: The testator, who died in 1871, devised certain freehold hereditaments at Benington, in the county of Lincoln, to his executors and trustees upon trusts for the benefit of his wife during her life, and after her death upon trust to sell the same and divide the proceeds among his four daughters equally: he also devised certain freehold hereditaments at Leverton subject to and charged with a mortgage debt of 1750*l.*, created by him in 1838, unto and to the use of his son Thomas R. Lacey, his heirs and assigns. The mortgage of 1838 contained a covenant in the usual form by the mortgagor for payment of principal and interest.

The executors duly proved the will and fully administered the personal estate within a very few months of the testator's decease.

In February, 1904, the widow died, and thereupon the defendant

Lightfoot, the surviving executor and trustee, sold the real estate at Benington, the proceeds amounting to 865*l.*

Down to April, 1904, the son Thomas R. Lacey duly paid the interest upon the mortgage of the real estate at Leverton, but on April 19, 1905, the plaintiffs, in whom the mortgage of 1838 had become vested, being unable to obtain payment of their debt and the security proving insufficient, obtained judgment quando acciderint in the King's Bench Division under Order XIV., r. 1, against Lightfoot upon the testator's covenant for payment of principal and interest, for 1819*l.* for principal and interest and 9*l.* for costs. The defendant Lightfoot in his affidavit admitted the debt, but pleaded plene administravit as to the personal estate, and claimed to hold the proceeds of the real estate at Benington as devisee-trustee. This judgment, however, was not relied on, and was not considered material in the view of the Court of Appeal.

On August 7, 1905, the plaintiffs, suing on behalf of themselves and all other the creditors of the testator, obtained against the defendant Lightfoot the usual judgment for the administration of the testator's real and personal estate, and the said sum of 865*l.* was paid into court. The plaintiffs were the only creditors.

On July 16, 1906, three of the four daughters of the testator who were interested in the proceeds of sale of the real estate at Benington took out a summons in the administration action asking for a declaration that, notwithstanding the judgment in the King's Bench Division of April 19, 1905, and the order for administration of August 7, 1905, the plaintiffs were barred by the Statute of Limitations from recovering any part of the proceeds of sale of the real estate at Benington, and for payment out to the applicants of the money in court.

Kekewich J. held, first, that the applicants being in the position of cestuis que trust of specifically devised real estate were within the decision of Turner L.J. in *Briggs* v. *Wilson* (1), and were entitled to plead the Statute of Limitations against the plaintiffs in the action; and, secondly, following *Dickenson* v. *Teasdale* (2), *Coope* v. *Cresswell* (3), and his own decision in *In re England* (4), that payment of interest by the mortgagee of

(1) (1854) 5 D. M. & G. 12, 21.
(2) (1862) 1 D. J. & S. 52.
(3) (1866) L. R. 2 Ch. 112.
(4) [1895] 2 Ch. 100.

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the real estate at Leverton had not kept the debt alive against the whole of the real estate, and that the applicants were accordingly entitled to the moneys in court.

The plaintiffs appealed.

Ingpen, K.C., and *S. R. Earle*, for the appellants, first took the objection that the applicants could not plead the Statute of Limitations after a full administration decree in an action in which the real estate was represented by the devisee in trust, and referred to Mitford on Pleadings, p. 202, and the Chancery Procedure Act, 1852 (15 & 16 Vict. c. 86), s. 42, r. 9, as shewing that *Briggs* v. *Wilson* (1) was wrongly decided; but on the Court intimating that in their opinion Kekewich J. could not have intended to have precluded the applicants from raising this point, and that, if necessary, leave to appeal against the administration decree could be given, this preliminary objection was not further insisted on.

Payment of interest on the mortgage of the Leverton estate, part of the testator's real estate, kept alive the mortgagee's right of action generally, and as against the rest of the testator's estate. Under 3 & 4 Will. 4, c. 104, all the real estate of the testator is assets for the payment of this debt, and payment of interest in respect of part keeps alive the mortgagee's right against the whole; part payment by any one of the devisees keeps the right of action alive against all. Lord Cranworth in *Roddam* v. *Morley* (2) adopted this principle and applied it to the suit for administration. These principles apply to the present case. The principles laid down in *Roddam* v. *Morley* (2) have been recognized and applied in *In re Hollingshead* (3), *Dibb* v. *Walker* (4), *Pears* v. *Laing* (5), *In re Gale* (6), *In re Chant* (7), and *Leahy* v. *De Moleyns* (8); notwithstanding the observations made upon it in *Coope* v. *Cresswell*. (9) The criticisms by Lord Westbury of *Roddam* v. *Morley* (2) in *Dickenson* v. *Teasdale* (10) are only dicta; and *Coope* v. *Cresswell* (9), so far

(1) 5 D. M. & G. 12.
(2) 1 De G. & J. 1.
(3) (1888) 37 Ch. D. 651.
(4) [1893] 2 Ch. 429.
(5) (1871) L. R. 12 Eq. 41.
(6) (1883) 22 Ch. D. 820.
(7) [1905] 2 Ch. 225.
(8) [1896] 1 I. R. 206.
(9) L. R. 2 Ch. 112.
(10) 1 D. J. & S. 52.

as it is inconsistent with *Roddam* v. *Morley* (1), should now be disregarded, as too should *In re England.* (2) According to the principles of *Roddam* v. *Morley* (1), the proceeds of sale of the Benington estate are assets available for the payment of creditors, including the mortgagee; and the payment of interest is a payment for the benefit, amongst others, of the uncharged portions of the real estate; the payment of interest, therefore, binds all those interested in the payment, that is, the devisees of the Benington estate, who cannot be treated as strangers to the mortgage transaction, and thus the statute is prevented from running in their favour.

The Real Property Limitation Act, 1874, s. 8, is the statute that governs the present case, and in that there is a distinction made between an acknowledgment and a payment made by a party liable. The person liable here was the mortgagor; this is no question of agency; as between himself and the testator's estate, Thomas R. Lacey, the mortgagor, was bound to keep down the interest on the mortgage debt; the payment of interest has been made "by a person bound to pay it," that is, "by the person by whom the same shall be payable," within the meaning of s. 8: *Bradshaw* v. *Widdrington.* (3) Payment by one party liable is enough to bind all the other persons liable or interested. The statute, therefore, has not run in favour of the daughters, and the plaintiffs are entitled to make up any deficiency on their original security out of any other part of the real assets and to have administration of the whole of the testator's real estate for that purpose.

P. O. Lawrence, K.C. and *P. Wheeler*, for the respondents, the daughters. Since *Sutton* v. *Sutton* (4), it is clear that the statute applicable to this case is the Real Property Limitation Act, 1874, though the cases decided under the earlier Acts are still a guide as to the principles to be applied. *Dickenson* v. *Teasdale* (5) and *Coope* v. *Cresswell* (6) are exactly in point and are binding upon this Court. If two estates are devised to different persons, one estate being incumbered and one not, payment of interest on the incumbered estate will not keep alive any rights against the

(1) 1 De G. & J. 1.
(2) [1895] 2 Ch. 100.
(3) [1902] 2 Ch. 430.
(4) (1882) 22 Ch. D. 511.
(5) 1 D. J. & S. 52.
(6) L. R. 2 Ch. 112.

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other. *Roddam* v. *Morley* (1) has no application to the case where the party making the payment is not the agent of the devisee of the unincumbered estate. Assuming that under the Debts Recovery Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 47), s. 3, the devise of the Benington property would have no effect as against the mortgagee, then the entry of the devisees as against the mortgagee creditor was wrongful and they could and did acquire a title by adverse possession. Though the Benington estate might have been made assets within twelve years, it cannot be made assets now. It ceases to be assets from the fact that the devisees have neither paid nor given any acknowledgment within twelve years. *Roddam* v. *Morley* (1) is not binding on this Court, certainly not so far as it is inconsistent with *Coope* v. *Cresswell* (2) and *Dickenson* v. *Teasdale* (3): *Wheeldon* v. *Burrows* (4); and where there are conflicting decisions of two Lord Chancellors the subsequent decision is entitled to the greater weight: *Henty* v. *Wrey*. (5) [*Ex parte Vicar of St. Mary, Wigton* (6), and *Gard* v. *Commissioners of Sewers of City of London* (7) were also subsequently referred to on the question of the binding effect of a decision of a Lord Chancellor.] Again, *Roddam* v. *Morley* (1) was decided on a different section of a different statute. Payment by one of several devisees is not sufficient; to have any such effect as is here alleged, the position or interest of the person making the payment must be such that he may fairly be held to represent the other persons interested in the land: *Astbury* v. *Astbury* (8); the admission or acknowledgment by one of two executors is a stronger case as between personal estate and real estate, than an acknowledgment or payment by one devisee is as against another devisee. *Astbury* v. *Astbury* (8) therefore shews that payment of interest by one executor would not have kept alive the debt as against these devisees, who had no interest in the mortgaged property. *In re Frisby* (9) seems to shew that the Mercantile Law Amendment Act, 1856, s. 14, gives no assistance in this case.

(1) 1 De G. & J. 1.
(2) L. R. 2 Ch. 112.
(3) 1 D. J. & S. 52.
(4) (1879) 12 Ch. D. 31, 54.
(5) (1882) 21 Ch. D. 332, 346.
(6) (1881) 18 Ch. D. 646, 648.
(7) (1885) 28 Ch. D. 486, 509.
(8) [1898] 2 Ch. 111, 117.
(9) (1889) 43 Ch. D. 106.

The acknowledgment or payment of interest only keeps the debt alive, qua that property of which the devisee is in possession as against the person making the payment, which he is liable to pay. [*In re Lord Clifden* (1) was referred to.]

In *Coope* v. *Cresswell* (2), the person who paid was, as between the two estates, the person who was liable to pay; the facts, therefore, of that case are very like the present. In that case and in *Dickenson* v. *Teasdale* (3) the question turned on s. 5 of 3 & 4 Will. 4, c. 42, the wording of which is stronger than the wording of s. 40 of 3 & 4 Will. 4, c. 27. The effect of s. 40 was considered in *Toft* v. *Stephenson*. (4)

[FARWELL L.J. Kindersley V.-C. points out the distinction between the two statutes in *Moodie* v. *Bannister*. (5)

VAUGHAN WILLIAMS L.J. referred to Darby and Bosanquet on Statutes of Limitations, 2nd ed. p. 159, to show that *Roddam* v. *Morley* (6) had been followed in preference to *Coope* v. *Cresswell*. (2)]

An acknowledgment by a mortgagee does not prejudice a puisne mortgagee: *Bolding* v. *Lane*. (7) The mortgagor in this case cannot be treated as in any sense the agent of the devisees: *Newbould* v. *Smith*. (8)

[*Magdalen Hospital* v. *Knotts* (9) was also referred to.]

A. J. Chitty, for the defendant Lightfoot, took no part in the argument.

VAUGHAN WILLIAMS L.J., after stating the facts, observing that in his opinion nothing turned upon the judgment recovered in the King's Bench Division, and having commented on the hardship of the case on the devisees of the Benington estate, continued:—*Roddam* v. *Morley* (6) was a decision of Lord Cranworth, who had asked for and obtained the assistance of two common law judges, whose opinion is set out in the report. That was a case in which it was decided that when a part payment or payment of interest has been made which has the

(1) [1900] 1 Ch. 774.
(2) L. R. 2 Ch. 112.
(3) 1 D. J. & S. 52.
(4) (1851) 1 D. M. & G. 28, 40.
(5) (1859) 4 Drew. 432.
(6) 1 De G. & J. 1.
(7) (1863) 1 D. J. & S. 122.
(8) (1886) 33 Ch. D. 127.
(9) (1879) 4 App. Cas. 324.

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effect of preserving any right of action that right will be saved not only against the party making the payment but also against all other parties liable on the specialty and that payment by one of the parties liable, as for instance the tenant for life in *Roddam* v. *Morley* (1), kept alive the right of action in its integrity. Lord Cranworth seems to me to have decided the case upon principles which plainly govern the present case. In *Roddam* v. *Morley* (1) it was held that payment of interest by a devisee for life on a specialty debt of his testator's, in which the heirs were bound, was an acknowledgment made by the party liable by virtue of the specialty, within the meaning of s. 5 of 3 & 4 Will. 4, c. 42, and served to keep the right of action alive in its integrity against all parties interested in remainder. The case on its facts was different from the present, which is not one of tenant for life and a person entitled in remainder. We have to deal with devisees, and in the present case the payments which had been made were payments by the devisee of a mortgaged property, and the persons against whom the right of action is said to have been kept alive by these payments are not, as devisees, interested in the mortgaged property. The way that they come into the matter is this. Under the Debts Recovery Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 47), the property which the testator has affected to devise is made assets of the testator, liable for the payment of his debts, and therefore the facts are different. But still, in my judgment, the principles upon which *Roddam* v. *Morley* (1) was decided govern this case. It is said that it would be very hard, and I think it is suggested that it could not have been the intention of the Legislature, that a payment by the devisee of one estate should be held to keep the debt alive as against the devisee of another estate, which is not the estate mortgaged or charged, so as to prevent the Statute of Limitations running in favour of the devisee of that part of the estate which was not subject to the charge or mortgage; but it seems to me that the principles upon which Lord Cranworth decided that case do govern this case, just as much as the case of *Roddam* v. *Morley* (1) itself. It is not suggested in the present case that the devisee of the mortgaged estate is under the

(1) 1 De G & J. 1.

circumstances to be regarded as an agent for the devisees of the real estate not subject to the mortgage; but what is said is, and it is common ground, that the Benington estate, which was not the subject of the mortgage, is assets available for the payment of creditors, including the mortgage creditor; and it is said that, according to the principles set forth by the judgment of Lord Cranworth, one must not regard the devisees of the uncharged realty of the testator as strangers to this mortgage transaction, because under the statute, as against a testator's estate, it is quite plain that the uncharged estate devised is liable as assets of the testator for the payment of so much of the mortgage debt as is unsatisfied. Under those circumstances, the payment, whether of interest or of principal, would be a payment for the benefit, amongst others, of the devisees of the unmortgaged estate. Against this, it is said that one ought only to treat a payment as preventing the statute from running, if it is made by a person who is really liable, in the sense of being liable to be sued, or that we ought only to make the payment prevent the statute running as against the person who makes the payment. At all events, it is said that *Roddam* v. *Morley* (1) has no application to a case where you cannot properly treat the party making the payment as the agent—either by appointment or by force of circumstances—of the devisee of the uncharged estate. I do not agree. I think that in principle the decision in *Roddam* v. *Morley* (1) involves this—that a payment made by a person who is not a stranger to the transaction in interest binds those who are interested in the payment—binds them to the extent of preventing the statute running.

Under these circumstances, it seems to me that I have to ask myself the question: What is the interest that the devisees of the uncharged estate have in this matter? It is quite plain that the payments which were made by the devisee of the charged estate are payments of which the devisees of the uncharged estate might have the benefit, because pro tanto it might relieve the uncharged estate in their hands of a burden. It was sought to say that that principle could only apply in cases where the person who got the benefit of the payments, by being pro tanto

(1) 1 De G. & J. 1.

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relieved of an obligation on his property, was a person who had a property interest in the mortgaged estate. I think it is impossible to come to that conclusion, if one gives due effect to the principles laid down by Lord Cranworth in *Roddam* v. *Morley*. (1)

Kekewich J. on this part of the argument came to the same conclusion that I have now come to, but he rather took the view that although that might have been the proper conclusion from the judgment in *Roddam* v. *Morley* (1) standing alone, the effect of the two decisions, in *Dickenson* v. *Teasdale* (2) and *Coope* v. *Cresswell* (3), was to limit the natural effect of *Roddam* v. *Morley* (1) and make it necessary for us to regard it as limited by those judgments. I think there is some ground for those observations, but with regard to *Dickenson* v. *Teasdale* (2) itself I wish to say that Lord Westbury, although he expresses his dissent from the reasoning—I suppose he meant from the principles involved in *Roddam* v. *Morley* (1)—gives no reasons for that dissent. He does not back up his criticism by argument, and it does not seem to me that the case which was before him necessarily involved his so doing. I think, therefore, with regard to *Dickenson* v. *Teasdale* (2), that we are entitled to treat it as an obiter dictum.

Then I pass on to the case of *Coope* v. *Cresswell* (3), and I am entitled to say this of it, that Lord Chelmsford himself did not consider the case of *Roddam* v. *Morley* (1) as overruled by his decision in *Coope* v. *Cresswell*. (3) On the contrary, he went out of his way to distinguish it rather than to say anything which could be treated as overruling it. Since then one has had a series of decisions, beginning with that of Bacon V.-C. in *Pears* v. *Laing* (4), followed by a second decision by the same Vice-Chancellor in *In re Gale* (5); we have the decisions of Chitty J. in *In re Hollingshead* (6) and *Dibb* v. *Walker* (7); the more recent decision of Buckley J., as he then was, in *Bradshaw* v. *Widdrington* (8), and the decision of Warrington J. in *In re*

(1) 1 De G. & J. 1.
(2) 1 D. J. & S. 52.
(3) L. R. 2 Ch. 112.
(4) L. R. 12 Eq. 41.
(5) 22 Ch. D. 820.
(6) 37 Ch. D. 651.
(7) [1893] 2 Ch. 429.
(8) [1902] 2 Ch. 430.

Chant (1), which, although it was a decision upon a simple contract debt, really raised the same question in principle as that raised in *Roddam* v. *Morley* (2) and in the two cases which are said to have qualified it.

Under these circumstances, the question is whether we are entitled or bound to accept the principle of the decision in *Roddam* v. *Morley* (2) as binding, or whether we are entitled or bound to treat the decision in *Dickenson* v. *Teasdale* (3) and *Coope* v. *Cresswell* (4) as having overruled or qualified that decision. In my judgment we are neither entitled or bound so to pass over the decision in *Roddam* v. *Morley*. (2) No one can read the subsequent decisions to which I have already alluded without seeing that the judges in the later cases, in so far as they had to determine which was the binding decision at the moment, treated *Roddam* v. *Morley* (2) as being binding rather than either *Dickenson* v. *Teasdale* (3) or *Coope* v. *Cresswell*. (4) I have already called attention to a passage in Darby and Bosanquet's Statutes of Limitations (2nd ed. p. 159), which shews that at all events some text-book writers regard the profession as having adopted *Roddam* v. *Morley* (2) as the governing case. But I have not to rely upon the views of text-writers; I can fall back upon a reported decision, and I prefer to take the case of *Bradshaw* v. *Widdrington* (5) and the judgment of Buckley J., to which I have already referred. That is a case which, after it was decided by Buckley J., went to the Court of Appeal, and the Court of Appeal entirely adopted, not only the result, but the reasoning upon which that result was based by Buckley J. The concluding words of the Master of the Rolls were these (6): "For these reasons I think that Buckley J., who delivered a most admirable judgment, in which he discussed all the authorities, was absolutely right, and, were it not for the vigorous and interesting argument which has been addressed to us by Mr. Terrell, I should have thought it sufficient to say that I entirely agree with the conclusion of Buckley J. as well as with his reasons." Then I look to see what the

(1) [1905] 2 Ch. 225.
(2) 1 De G. & J. 1.
(3) 1 D. J. & S. 52.
(4) L. R. 2 Ch. 112.
(5) [1902] 2 Ch. 430.
(6) *Ibid.* 454.

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judgment of Buckley J. was, and I find the learned judge dealing with the cases of *Chinnery* v. *Evans* (1) and *Harlock* v. *Ashberry* (2), and he says (3): "That was the question which the Court had to decide; but in delivering judgment upon that I find that Jessel M.R. read the passage from *Chinnery* v. *Evans* (1) which I have just quoted, and then went on to say, 'Therefore on principle and on authority I think that the payment to take the case out of the statute must be a payment by a person who is bound to pay the principal or interest of the mortgage money, and this is not such a payment.' Now, what did Jessel M.R. there mean by 'bound'? Did he mean 'bound towards the mortgagee'? I think not, because he had just read language in which Lord Cranworth had commented upon the fact that the receiver was no stranger—not to the mortgagee, but to the mortgagor—and I think he meant a payment by a person who is bound as between himself and the mortgagor to pay the interest upon the mortgage money. Then, when I come to the judgment of Brett L.J., it seems to me that this is more plain. He said: 'Then the question arises whether payment of rent by a tenant to a mortgagee who had exercised the right to demand the rent, is a payment of principal and interest within that section. I come to the conclusion that it is not, for three reasons'; and the third reason is this: 'But even if it could be held to be a payment of principal or interest, it is not a payment at all by the mortgagor or any agent of the mortgagor, or by any person bound to make payment of principal or interest on his behalf, and I think that a payment of principal or interest, to be a payment within this section, must be made by the mortgagor or his agent, or at least by a person bound or entitled to make a payment of principal or interest for the mortgagor, as was the receiver in the case of *Chinnery* v. *Evans*. (1) The question may be asked, Why must this payment be by the mortgagor or his agent, or at least by a person bound or entitled to make a payment of principal or interest on his behalf? It seems to me the reason is that in all Statutes of Limitations the principle on which they are founded is that in those cases in

(1) (1864) 11 H. L. C. 115. (2) (1882) 19 Ch. D. 539, 546, 547.
(3) [1902] 2 Ch. 438, 439.

which a payment is allowed to take the case out of the operation of the Statute of Limitations it must be such a payment as amounts to an acknowledgment of liability.' Now, what did the Lord Justice mean there by 'bound'? Bound, I conceive, as between that person and the mortgagor—'bound,' he says, 'to make a payment for the mortgagor.' And, again, he said: 'On the ordinary rules of construction, and on the authority of *Chinnery* v. *Evans* (1), I feel bound to say that a payment, to come within 1 Vict. c. 28, must be a payment by a person liable as mortgagor or some person on his behalf, or such a person as was the receiver—a person entitled to pay on his behalf,' that is, a person entitled by reason of the relations between himself and the mortgagor to pay money on his behalf. It seems to me, therefore, that the whole of the language of those judgments is in favour of the view which I take, and that the principle is that the person bound to pay, and whose payment is material for the purposes of the statute, is—not a person bound as between himself and the mortgagee, but a person bound as between himself and the mortgagor."

Of course if payment is made by a person who is, strictly speaking, an agent for the other, one can quite see that that ought to prevent the statute running, just as much as if payment had been made by the person liable, that is, liable to be sued, and compelled to pay by his own hand. But Buckley J. by no means limits his judgment to that case. In the words that I have been reading it will be observed that he speaks of the liability being continued by the payment by a person entitled to pay on his behalf, that is the person liable to be sued. It seems to me that in a case like the present the devisee of the mortgaged estate not only is entitled to pay, but has a positive duty to pay, and under those circumstances I think comes within the principles which were laid down by Buckley J., and at the end of his judgment he points out this, and says (2): "I need only add to those passages this from *Lewin* v. *Wilson* (3) where Lord Hobhouse, in delivering the judgment of the Privy Council, after referring to *Chinnery* v.

(1) 11 H. L. C. 115. (2) [1902] 2 Ch. 439, 440.
(3) (1886) 11 App. Cas. 639, 644.

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Evans (1) and *Harlock* v. *Ashberry* (2), said: 'Their Lordships have not been referred to any case where it has been decided that payment made by some person concerned to answer the debt has been held to be insufficient to keep a right alive against the party charged in the suit merely because he was not that party or his agent,' and there is no such authority to be found as far as I know. Here I agree that payment was not made by the mortgagor, James Edward Bradshaw. Whether it was made by his agent or not is another matter. For the present purpose I am assuming that William Bradshaw was not his agent. Assuming that he was not his agent, still it was made by William, who was, I think, as between himself and his father, the person who was bound to pay. Inasmuch as that was so, William's payment, made in pursuance of his contractual obligations towards his father, was, as it appears to me, his father's admission of liability." The result of this judgment is, that if there is a payment made by a person who is not a stranger and who has a duty to pay—a duty in this case towards the devisee of the uncharged estate—that that is a sufficient payment to prevent the statute running in favour of the devisee of the uncharged estate.

Having made these observations, there are one or two other things which I think ought to be noticed. It is said that the decision in *Roddam* v. *Morley* (3) does not apply, because it was a decision under a different section of a different Act of Parliament. I agree; but it seems to me that nevertheless the question arises under an Act of Parliament to which the principles which underlie the judgment in *Roddam* v. *Morley* (3) apply. It was suggested that they do not apply because, in dealing with s. 8 of the Act of 1874, which governs this case, one ought to hold that under that statute the effect of the payment was that it created a fresh promise to pay, and with regard to this I can only say that I think that argument is ill founded in the sense that it does not truly set forth the basis of the Act of 1874. Nobody suggests that the effect of a payment in the case of these Real Property Statutes of Limitations is that there is a

(1) 11 H. L. C. 115. (2) 19 Ch. D. 539.
(3) 1 De G. & J. 1.

personal promise to pay by the person making the payment, in the sense that he undertakes to pay the debt whether he has assets or not. That is not so. I think, therefore, that this point, that the decision in *Roddam* v. *Morley* (1) does not apply, fails altogether. There was some discussion in the course of the argument as to whether s. 14 of the Mercantile Law Amendment Act, 1856, applied, but I think we all came to the conclusion that that Act does not apply, because it only applies in respect of named statutes, and this statute is not one of the named statutes. I confess myself I should have been very glad to have found that s. 14 of the Mercantile Law Amendment Act did apply, because if it had applied we could have found a way of avoiding what seems to me somewhat of a hardship upon these ladies. Speaking for myself, in delivering this judgment I feel that I have not even attempted to exhaust the matter. I have not in any way gone through the judgments of Lord Cranworth or the opinions of the common law judges who assisted him with their opinions, because what I had to say about that decision was, that in my opinion there cannot be much doubt but that that case does apply to this case, except in so far as anything in the judgments of Lord Westbury and Lord Chelmsford repectively may have prevented it. That was obviously the view of Kekewich J., and I really deal with this case as being a case in which what we have really to decide is simply the question of whether we are to treat *Roddam* v. *Morley* (1) as the binding authority on this question, or whether we are to treat *Dickenson* v. *Teasdale* (2) and *Coope* v. *Cresswell* (3) as binding. I ought to say one word more about the case of *Leahy* v. *De Moleyns* (4), which is on all fours with the present case. Of course in one sense it is not an authority here, but as one so often finds in Irish cases the judges have dealt most exhaustively with the decisions, and both the Master of the Rolls and the Court of Appeal, Walker L.C., Fitz-Gibbons L.J., and Barry L.J., being the members of the Court, have dealt with a matter which I say is on all fours with this one, upon the basis that the decision in *Roddam* v. *Morley* (1) does apply to a case of this sort, and not only in the limited cases

(1) 1 De G. & J. 1.
(2) 1 D. J. & S. 52.
(3) L. R. 2 Ch. 112.
(4) [1896] 1 I. R. 206.

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mentioned by Lord Westbury and Lord Chelmsford, and that it not only applies, but notwithstanding other decisions is the binding authority on this part of the law. I think this appeal ought to be allowed.

FARWELL L.J. I agree that this appeal must be allowed. The only fact relied upon to take the case out of the statute is the payment of interest within twelve years before action by the owner of the mortgaged estate. The judgment against the executor at common law was not relied upon, and in my opinion rightly. On the death of the debtor the creditor had two remedies in respect of his debt, one against the personal, and the other against the real, representative; the debt remained unaffected by the death or by lapse of time, but the remedies would become barred in process of time by the Statute of Limitations. These remedies and the persons against whom they were enforceable were so absolutely distinct that before the Judicature Acts the heir or devisee and the executor could not have been sued jointly at common law in respect of the debt, and no admission or acknowledgment made by one can bind or affect, or be used in evidence against, the other or the estate that he represented. See *Putnam* v. *Bates* (1), followed by Stirling J. in *Astbury* v. *Astbury*. (2)

On the main point urged we have to consider the conflicting decisions of three Lord Chancellors in *Roddam* v. *Morley* (3), *Coope* v. *Cresswell* (4), and *Dickenson* v. *Teasdale*. (5) My own opinion is that, inasmuch as they are decisions on another statute, they are not technically binding upon us, but that we are free to decide this case on our own view of the construction of the Act under which it is agreed that the present question arises, namely s. 8 of the Real Property Limitation Act, 1874, but we are bound to compare it with s. 5 of 3 & 4 Will. 4, c. 42, and if there is no practical distinction between the two sections we have then to compare the reasoning of the judgments in the conflicting cases and to decide according to our own opinion.

(1) (1826) 3 Russ. 188.
(2) [1898] 2 Ch. 111.
(3) 1 De G. & J. 1.
(4) L. R. 2 Ch. 112.
(5) 1 D. J. & S. 52.

Now I can find no distinction between the two sections sufficient to make the reasoning of the two common law judges and the Lord Chancellor in *Roddam* v. *Morley* (1) inapplicable to the present case. The only distinctions I can see are distinctions without a difference. The wording of the Act of 3 & 4 Will. 4, c. 42, s. 5, is—"If any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such indenture, specialty, or recognisance, or his agent, or by part payment or part satisfaction on account of any principal or interest." It will be observed that the words are "the party liable by virtue of," and so on, and that there is no person named to whom the acknowledgment should be made, although it is obvious of course that the payment can only be made to the person entitled to receive it. In s. 8 of the Real Property Limitation Act, 1874, the wording is slightly different, the words being "unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent." I can see no difference between the words "by whom the same shall be payable" and "the person liable to pay." I also have come to the conclusion that it makes no difference that the person is named to whom the acknowledgment is to be made in the one section and not in the other. We are dealing with the Real Property statute, and need not consider the possible difficulty of implying an authority to contract a new debt, as would be the case under the Limitation Act, 1623 (21 Jac. 1, c. 16). Under that Act the acknowledgment is a new promise to pay; under the Act now under consideration, and also under 3 & 4 Will. 4, c. 42, it is a withdrawal, by virtue of the statute, of the abrogation of the remedy, and leaves the old debt still recoverable at law: see *Moodie* v. *Bannister* (2) and *Lord St. John* v. *Boughton* (3), where Vice-Chancellor Shadwell says: "The trustee, who is the party by whom the money is payable, may acknowledge the debt by a writing signed either by himself or

(1) 1 De G. & J. 1.
(2) (1859) 4 Drew. 432; 28 L. J. (Ch.) 881.
(3) (1838) 9 Sim. 219, 225.

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his agent; but such an acknowledgment will not impose on him any personal liability to pay the debt." I think, therefore, that the sections are, in fact, distinguishable. What then is the principle on which the conflicting decisions rest? *Roddam* v. *Morley* (1) appears to me to rest upon the joint liability of a number of persons standing in equal peril of suit, and who all benefit by the discharge of all or any part of such liability. The Lord Chancellor says: "The section, it will be observed, does not specify by whom the part payment must be made. But there can, I think, be no doubt, it must be made by a party interested. It would be absurd to suppose that the Legislature meant to give any right against the debtors by the act of a mere stranger; the only question is, whether the devisee for life is a party interested. I think he certainly is. The statute, as is observed by the learned judges, must have been intended to meet the case of several persons liable as well as that of a single obligor, and it never could have been contemplated that, in order to prevent the operation of the statutory bar, there must always be an actual payment by all the persons liable. The question, however, still remains if the payment is made by one only of several persons liable; as, for instance, by a person having only a life interest, who is affected by the payment? Does it operate against the party only by whom the payment is made? or does it affect all other parties liable? Does it merely enable the creditor to sue the party by whom the payment was made, or does it set free the action generally? I have come to the conclusion that when a part payment or payment of interest has been made, which has the effect of preserving any right of action, that right will be saved, not only against the party making the payment, but also against all other parties liable on the specialty." Then he goes on to consider that question. Now what is a party interested?—interested in what? It cannot be in any land charged, because it applies to all specialty debts, whether charged on land or not; but it must mean some person interested by reason of his liability with others in keeping down the debt, and whose act of payment binds those others because they

(1) 1 De G. & J. 1, 18.

are relieved to the extent of such payment from the liability which is imposed on them all. It is important to consider what is the liability to which the heir at common law and the heir or devisees under the Acts of 3 Will. & Mary, c. 14, and 11 Geo. 4 & 1 Will. 4, c. 47, were subjected. I think it is plain that the liability is in debt, and that of the heir and of the devisees is a joint liability at law. I have looked at the older cases, and I find it stated in *Davy* v. *Pepys* (1) that the writ against the heir "shall be in the debet et detinet." So too Lord Hardwicke in *Kinaston* v. *Clark* (2) says: "The heir is as much debtor upon the bond as the obligor, and so laid down in Plowden 440. . . . . An heir must be charged in the debet as well as the detinet, and before the statute of jeofails it would have been error if otherwise, which shews plainly the heir is to be considered as a debtor: if judgment go by default against an executor, it can only be de bonis testatoris; but if judgment be by default against the heir, it must be against him personally, which is another proof of the law considering him as a debtor." In *Galton* v. *Hancock* (3), Lord Hardwicke deals with the case of heir and devisees under the statute of 3 Will. & Mary, c. 14, and says (4): "By force of this statute, the devisee is made liable at law; and the action must be brought jointly against the heir and devisee." He then considers what form of judgment ought to be entered up under the Act. It had been argued that there ought to be two distinct judgments, first that the heir should make satisfaction, and that if he had not sufficient assets then that the devisee should do it; but the Lord Chancellor rejected this, and held that the Act was for the benefit of the creditors without any regard to the position of the heir and devisees inter se, for the enabling clause entitled the creditor to a new-formed writ and to bring a new action, "for otherwise there might have been a collusion between the devisee and heir-at-law, to play off the will, or not, just as it should suit them best; therefore it was a necessary and wise provision of the Act, to join the heir and devisee in the action, to secure the creditor at all events"; and he accordingly held that

(1) (1572) 2 Plowd., 438a, 440.
(2) (1741) 2 Atk. 204, 205.
(3) (1744) 2 Atk. 430, 432.
(4) Ibid. 433

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the judgment must follow the writ and count and be a judgment against heir and devisee jointly. So in Chitty on Pleadings (7th ed., 1844, vol. i. p. 61) it is stated that a devisee must be sued with the heirs jointly at law as well as in equity, and the form of declaration will be found in the second volume, at p. 333, where the creditor complains of heir and devisee, "who have been summoned to answer the plaintiff in an action of debt, and the plaintiff demands of them the sum of £ , which they owe to and unjustly detain from him." The position of the heir is thus stated in Plowden in the passage referred to by Lord Hardwicke (1): "When the heir denies assets, and it is found against him, or when he does not deny assets, but pleads other matter which implies that he has assets, the debt of his ancestor is become his own debt, in respect of the assets which he has in his own right, and so the property of the land which he has in his own right, makes the debt to be his own proper debt."

The devisee is put in the same position as the heir by the statutes, and their indebtedness was one which (if they admitted heirship or devise and the debt) had to be met by special plea of riens per descent, or riens per devise, or nothing but a reversion or remainder. See Chitty on Pleadings, vol. i. p. 517. The result is that for the purpose of this specialty debt all the devisees under the will, whether they are devisees of a mortgaged or a free estate, stand on the same footing and are jointly liable to the specialty creditor; and such specialty creditor is entitled, and indeed ought, to sue them all in one action, and under the old law would have exposed himself to a plea in abatement if he had not joined them all. It follows from this joint liability, on the principle laid down in *Roddam* v. *Morley* (2), that payment by one is a payment in relief of the others, because they were all bound together, and payment would, therefore, have been made by a person liable to pay, on behalf of the whole of those who are also liable jointly with him. That is the reasoning in *Roddam* v. *Morley* (2), and appears to me to be unanswerable.

Roddam v. *Morley* (2) was decided in April, 1857, though it first came before the Lord Chancellor in July, 1856, and in the

(1) 2 Plowd. 440a. (2) 1 De G. & J. 1.

same year the Mercantile Law Amendment Act was passed, by s. 14 of which (19 & 20 Vict. c. 97) it is enacted:—"In reference to the provisions of the Acts of the twenty-first year of the reign of King James the First, chapter sixteen, section three, and of the Act of the third and fourth years of the reign of King William the Fourth, chapter forty-two, section three, and of the Act of the sixteenth and seventeenth years of the reign of Her present Majesty, chapter one hundred and thirteen, section twenty, when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor, or administrator, shall lose the benefit of the said enactments, or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money, by any other or others of such co-contractors or co-debtors, executors, or administrators." I think it clear that several devisees of distinct estates under the same will (as in the present case) are co-debtors in respect of their testator's specialties within the meaning of this section, although different considerations may apply to the case of tenant for life and remainderman of a single estate: it may be that, having regard to the form of plea open to them, referred to above (Chitty, vol. i. 517), they are liable successively and not as co-debtors; and this may be the meaning of Chitty J.'s observations in *In re Hollingshead* (1):—"The Mercantile Law Amendment Act and Lord Tenterden's Act are both silent on the subject of any such payment made by a tenant for life of the real estate of a deceased debtor, and these Acts therefore have no direct bearing on the question to be decided." In *Dickenson* v. *Teasdale* (2) payments had been made down to 1845, and in *Coope* v. *Cresswell* (3) down to 1849, and the suit in each case was commenced within twenty years after those respective dates. It appears to me, therefore, to be clear that the respondents in this case would have been co-debtors within, and entitled to the benefit of, this section of the Mercantile Law Amendment Act, if it had not been that in 1874 the Real Property Limitation Act

(1) 37 Ch. D. 651, 657. (2) 1 D. J. & S. 52.
(3) L. R. 2 Ch. 112.

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was passed which by s. 8 reduced the period for recovering money charged on land from the twenty years given by 3 & 4 Will. 4, c. 27, s. 40, to twelve years, but left the twenty years for recovering specialties given by 3 & 4 Will. 4, c. 42, s. 3, untouched, and it was decided by *Sutton* v. *Sutton* (1) and *Fearnside* v. *Flint* (2) that where the money was in fact secured by a charge on land the personal remedy on the covenant or collateral bond was limited in like manner, with the result that the statute applicable to such a case is now the Act of 1874 and not the Act of 3 & 4 Will. 4, c. 42, s. 5. And it was further held in *In re Frisby* (3), that as the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97, s. 14), is confined to certain specified Acts which do not include either the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), or the Real Property Limitation Act, 1874, the unfortunate co-debtor has, as from 1874, been deprived of the protection given him by the Mercantile Law Amendment Act, 1856. The Legislature cannot have contemplated any such result, and I think that it is a great hardship on the respondents. The debt was created seventy years ago, the devisees whose estate is now attached have been in undisturbed possession for more than thirty-five years, the whole tendency of modern legislation has been to shorten the time within which actions can be brought, and yet the very Act which cut down the twenty years to twelve has had the unforeseen effect of reviving a liability intended to be abolished in 1856 and enforcing it after such a lapse of time as this. But, although I think that it is a hard case, we have only to administer the law as we find it. The appellants have done nothing to deprive themselves of their legal rights, and even if this were to be regarded as an equitable and not a legal claim, the mere lapse of time without more would not avail the respondents: see *Blake* v. *Gale*. (4) With regard to the other cases cited, I do not myself see the applicability of *Bradshaw* v. *Widdrington* (5) to the present case. I read it as a decision on the words "or agent," and as shewing that a man can be an "agent" within the meaning of the Act, not only

(1) 22 Ch. D. 511.
(2) (1882) 22 Ch. D. 579.
(3) 43 Ch. D. 106.
(4) (1886) 32 Ch. D. 571, 578.
(5) [1902] 2 Ch. 430.

when he acts for a principal properly so called but also when he makes the payment on behalf of the debtor, because he has bound himself by deed for value so to do. I think that the case proceeds on the same reasoning as Lord Wensleydale's judgment in *Forsyth* v. *Bristowe* (1), as explained by Chitty J. in *Dibb* v. *Walker*. (2) With regard to *In re Chant* (3), if the reasoning on which *Roddam* v. *Morley* (4) was founded applies to simple contract debts, I fail to see why the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), should not have applied, if it had been cited, which it was not.

These considerations, however, are not material in this case, and the two other decisions (*Dickenson* v. *Teasdale* (5) and *Coope* v. *Cresswell* (6)) are not founded on any principle that I have been able to discover, but rest on the statement that it would be so hard a case that the Legislature cannot have intended it. I regret to say that, in my opinion, the Legislature have said it, and that I feel bound to give effect to their enactment, and to allow this appeal accordingly.

BUCKLEY L.J., after stating the facts, said:—The question for decision is whether, having regard to the fact that the mortgage interest was paid down to 1904, the mortgagees can reach the proceeds of sale of the Benington Estate. The question turns on s. 8 of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57). When the testator died, his debt under the covenant contained in the mortgage deed was a debt recoverable, of course, out of his personal estate, and also by virtue of the Administration of Estates Act, 1833 (3 & 4 Will. 4, c. 104), out of his real estate. By that Act the real estate was made assets to be administered by a court of equity for payment of his just debts. In order to reach real estate, a creditor would, no doubt, have to sue and bring before the Court, not the executor only, but the devisee also, and I assume that even if the executor had admitted the debt, or allowed judgment to go for the debt, so that as regards the personal estate it could not be said that the

(1) (1853) 8 Ex. 716.
(2) [1893] 2 Ch. 429, 436, 437.
(3) [1905] 2 Ch. 225.
(4) 1 De G. & J. 1.
(5) 1 D. J. & S. 52.
(6) L. R. 2 Ch. 112.

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Statute of Limitations applied, yet the devisee could in that action have pleaded the Statute of Limitations. The question is whether he could maintain that plea when the facts are that the mortgage interest has in fact been paid by the devisee of the mortgaged estate down to the year 1904.

Thomas Rhodes Lacey, the devisee of the mortgaged estate, was of course not personally liable upon the covenant. He was, however, liable in the sense that by foreclosure proceedings the mortgage debt and interest could be enforced against the estate of which he was devisee, and his rents could have been taken for payment of the interest. He was also liable in the sense that, as devisee of the mortgaged estate subject to the mortgage debt, he, as between himself and the persons who under the testator's will were entitled to the testator's other estate, was the person liable to keep down the mortgage interest. He and the other parties who took beneficially under the testator's will were objects of the testator's bounty, upon the terms that, as between the devisee of the mortgaged estate and the other beneficiaries, the former should bear the interest. If the creditor had taken, as he might have taken, proceedings to enforce the debt against the personal estate and the other real estate, and had rendered the other real estate liable, the beneficiaries of that real estate would have been entitled to call on the devisee of the mortgaged estate to bear the interest to their indemnity. On each occasion, therefore, when the devisee of the mortgaged estate paid the interest he made a payment which relieved the devisees of the other real estate from the possibility of the creditor reaching and making liable for the debt the real estate devised to them.

Lord Chelmsford in *Coope* v. *Cresswell* (1) says: "Part payment is a benefit to all persons liable to the debt, as it relieves them from so much of their liability." By the words "persons liable to the debt," I understand to be meant the persons who could be made poorer by being called upon to pay the debt. Every time the devisee of the mortgaged estate paid the interest he was benefiting the other beneficiaries of the testator, in that he was relieving them from the possibility of their devised estates being called upon to make payment. As between

(1) L. R. 2 Ch. 112, 124.

the creditor and the devisees of the other real estate the latter were, of course, not in any way liable to the former; as between the devisee of the mortgaged estate and the other devisees the former was bound towards the latter to pay the interest to their indemnity.

Before the statute 3 & 4 Will. 4, c. 42, there was no statutory limitation affecting actions on specialties. A practice had grown up in the Court of presuming, after the lapse of twenty years, that payment had been made, or that the debt had been released. In that state of things 3 & 4 Will. 4, c. 42, was passed; it appears to me that it was passed with the intention—and this, I think, is its effect—that the result of making payment is not to create in the person who pays a liability by way of a new promise to pay, but is that such action as could have been brought before the statute remains open to the person who before the statute would have been competent to sue. In other words, if such an act has been done as to stop the operation of the statute, the specialty remains operative as against all persons who could have been rendered liable if there had been no statute at all.

Under these circumstances it appears to me that the principles stated by Lord Cranworth in *Roddam* v. *Morley* (1) are exactly applicable to the facts of this case. Lord Cranworth says this: "The question, however, still remains if the payment is made by one only of several persons liable; as, for instance, by a person having only a life interest, who is affected by the payment? Does it operate against the party only by whom the payment is made? or does it affect all the other parties liable? Does it merely enable the creditor to sue the party by whom the payment was made, or does it set free the action generally? I have come to the conclusion that when a part payment or payment of interest has been made, which has the effect of preserving any right of action, that right will be saved, not only against the party making the payment, but also against all other parties liable on the specialty." By these last words "liable on the specialty," I do not understand Lord Cranworth to have meant only persons who could be sued on the covenant. I think that follows from the words with which this paragraph begins, which are these:—

(1) 1 De G. & J. 1, 18.

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"The section, it will be observed, does not specify by whom the part payment must be made. But there can, I think, be no doubt, it must be made by a party interested." When he speaks of the right of action being saved against all other parties liable on the specialty, I think Lord Cranworth meant saved against all other parties who, having regard to the existence of the specialty debt, could be reached for the purpose of payment.

The reasoning of *Roddam* v. *Morley* (1) was that, as between tenant for life and remainderman, the tenant for life had to keep down the interest, and that in that state of facts payment by the tenant for life was a payment which kept the right of action alive against the parties interested in remainder. I cannot see upon principle that there is any difference between objects of the testator's bounty who take the same property in succession and objects of the testator's bounty who take different properties, when in each case it is the duty of one of the volunteers to keep down the payment of the interest to the indemnity of the others of the volunteers. I think that a good deal of the argument in this case has arisen from the fact that counsel have not borne sufficiently in mind that we have here nothing to do with any question of a charge upon land. The question is not whether the land which the creditor now seeks to affect is in any way charged with the debt, but whether it is capable of being reached by the person who is the creditor in respect of the debt. We have nothing to do with any question of a charge. The fact that in *Roddam* v. *Morley* (1) the estate was held by way of succession by a tenant for life, with remainder to remainderman, does not in my opinion differentiate that case from the present. As between a devisee who took for life, and a devisee who took a reversionary interest expectant on that estate for life, and a devisee who took another estate in possession under the same testator, there is to my mind for the present purpose no difference: they are all persons whose interests in the testator's estate are capable of being reached by the testator's creditors. To all such, as it appears to me, the reasoning in *Roddam* v. *Morley* (1) applies.

The principle of *Roddam* v. *Morley* (1) has been followed in

(1) 1 De G. & J. 1.

cases which I will simply mention in order of date: *Pears* v. *Laing* (1), *In re Hollingshead* (2), *Dibb* v. *Walker* (3), *In re Chant* (4), and *Leahy* v. *De Moleyns*. (5) On the other hand, there are two decisions, one by Lord Westbury, *Dickenson* v. *Teasdale* (6), and the other by Lord Chelmsford, *Coope* v. *Cresswell* (7), which no doubt create considerable difficulty. Lord Westbury in *Dickenson* v. *Teasdale* (6) dismissed the matter in the passage at the bottom of p. 62 in few words, and gave no reasons for the conclusion at which he arrived. Lord Chelmsford in *Coope* v. *Cresswell* (7), while saying that he is unable to concur in the reasoning in *Roddam* v. *Morley* (8), says in effect that he is not overruling it. In this state of the authorities I think we are entitled to adopt Lord Cranworth's decision in *Roddam* v. *Morley* (8) and the numerous cases which have followed it. The decision of this Court in *Bradshaw* v. *Widdrington* (9) is another authority which to my mind has a very close bearing on this case. It seems to me that here, as there, the mortgage interest was kept down by a person who, as between himself and the other beneficiaries claiming under the mortgagor, was bound to keep it down, and that this was for the purpose of the Statute of Limitations a payment so made as to keep the right of action alive.

To arrive at any other conclusion seems to me attended with the greatest difficulty. The mortgagees were in fact in receipt of their interest, duly paid, down to 1904. What course could they take to keep alive as against the testator's other real estate their remedy for the deficiency (if any) of their security? They were not bound to call in their money and give up their investment. The only courses open to them, so far as I can see, were either to enforce their security, which they were not bound to do, or to accept the consequence, if that be the consequence, of finding that their remedy against the testator's other assets was gone, because they accepted payment of their interest from the person who as between all the parties interested was the right person to make payment to them.

(1) L. R. 12 Eq. 41.
(2) 37 Ch. D. 651.
(3) [1893] 2 Ch. 429.
(4) [1905] 2 Ch. 225.
(5) [1896] 1 I. R. 206.
(6) 1 D. J. & S. 52.
(7) L. R. 2 Ch. 112.
(8) 1 De G. & J. 1.
(9) [1902] 2 Ch. 430.

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In my judgment the remedy against the testator's other real assets has not been lost, and the appellants are entitled to enforce it against the proceeds of sale of the testator's Benington estate. It follows that the order which Kekewich J. made ought to be reversed.

Solicitors: *Collyer-Bristow, Curtis & Co., for Wilson, Bell & Ingoldby, Louth; Gibson & Weldon, for W. F. Howard, Spalding; Pilley & Mitchell, for Staniland & Son, Boston.*

W. C. D.

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DAVIS *v.* HUTCHINGS.

[1906 D. 903.]

Trustee—Breach of Trust—Charge on Share of Beneficiary—No Notice to Trustees—Assignment of Share subject to Charge—Solicitor—Fraudulent Statement—Payment to Assignee of Equity of Redemption—Duty to investigate Assignee's Title — Constructive Notice — Liability — Relief — Judicial Trustees Act, 1896 (59 & 60 *Vict. c.* 35), *s.* 3, *sub-s.* 1.

The defendants, who were trustees, upon the distribution of their trust fund paid the share of a beneficiary to their solicitor in reliance upon his statement that he was the assignee of the share and without calling upon him to prove his title. The share had been assigned to him by deed which recited the creation of a prior charge on the share and assigned the share expressly subject to the charge. The solicitor had acted for the plaintiff upon the transfer to her of this charge, but no notice of the charge or transfer had ever been given to the trustees. In an action for an account and payment of what was due under the charge:—

Held, that the defendants were liable, on the ground that the assignment of the share necessarily set them upon inquiry as to the title of the alleged assignee, and that if they had done their duty and properly investigated his title they would have been affected with notice of the plaintiff's charge, and that, having failed in their duty, they could not shelter themselves behind the fraud of their solicitor.

Jones v. *Smith*, (1841) 1 Hare, 43; (1843) 1 Ph. 244, applied.

Held, further, that the defendants were not entitled to relief under s. 3, sub-s. 1, of the Judicial Trustees Act, 1896, the section not having been intended to apply to a case of this kind.

ACTION.

The following facts are taken from the agreed statement of facts used by the parties for the purposes of the trial:—

By an indenture dated March 3, 1896, W. L. Challoner assigned all the share to which he was then absolutely entitled under an indenture dated July 3, 1846, of and in the proceeds of sale of certain real estate to Charles Nichols by way of mortgage to secure payment of the sum of 350*l.*, with interest thereon at the rate of 7*l.* 10*s.* per cent. per annum.

By an indenture dated May 10, 1897, C. Nichols transferred the mortgage debt and security to the plaintiff and J. W. Davis, who by an indenture of April 25, 1898, transferred the mortgage debt and security to the plaintiff.

No notice of the mortgage or of either of the transfers by or on behalf of any of the parties claiming thereunder respectively was ever given to the defendants, who were then and now the trustees of the indenture of July 3, 1846.

By an indenture dated August 2, 1901, W. L. Challoner, after a recital that he had already charged his share to secure the sum of 350*l.*, assigned the same share to Alfred Nichols absolutely subject to the existing charge of 350*l.*

Alfred Nichols was the solicitor of the defendants, and also the solicitor of the plaintiff. He had for many years acted as the solicitor to the Challoner trustees and their cestuis que trust.

In the month of June, 1905, the trust funds subject to the trusts of the indenture of July 3, 1846, became distributable, and Alfred Nichols stated to the defendants, and they believed, that he was absolutely entitled by assignment from W. L. Challoner to the share of the latter under the indenture of July 3, 1846, and, relying on such statement and without requiring him to prove his title, they allowed him to receive and retain the whole amount of the share. On June 13, 1905, he signed a receipt for the money therein stated to be due to him as assignee of W. L. Challoner, and he also executed an indenture of release and indemnity, undated, but bearing a stamp dated May 19, 1905, which contained (among other recitals) a recital to the effect that by an indenture therein by mistake stated to have been made on July 26, 1901 (meaning, as the defendants believed, the said indenture of August, 2, 1901), the share of W. L. Challoner was assigned to and became absolutely vested in Alfred Nichols.

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On March 15, 1905, a receiving order in bankruptcy was made against Alfred Nichols, who shortly afterwards died insolvent.

From April 25, 1898, down to shortly before his death, Alfred Nichols had paid to the plaintiff interest on the sum of 350*l.*, but at 5*l.* per cent. only.

The plaintiff commenced this action for an account of what was due to her for principal interest and costs under the mortgage, and payment of what should be so found due to her out of W. L. Challoner's share of the trust funds in question.

The defendants denied liability, and claimed relief in respect of the breach of trust, if any, under s. 3, sub-s. 1, of the Judicial Trustees Act, 1896.

P. O. Lawrence, K.C., and *G. Henderson*, for the plaintiff. We submit that it does not matter whether notice of the mortgage or transfers was given to the defendants or not; the real question is whether, where trustees pay to an assignee of a cestui que trust and the assignment contains notice of an incumbrance, they are justified in paying the trust fund to the assignee without calling upon him to prove his title. We assume that the fact that the defendants allowed Nichols to receive and retain the fund amounted to payment to him.

This case falls within the class of cases mentioned by Wigram V.-C. in *Jones* v. *Smith* (1), "cases in which the party charged has had actual notice that the property in dispute was, in fact, charged, incumbered, or in some way affected, and the Court has thereupon bound him with constructive notice of facts and instruments, to a knowledge of which he would have been led by an inquiry after the charge, incumbrance, or other circumstance affecting the property of which he had actual notice." That decision was affirmed on appeal (2) by Lord Lyndhurst L.C., who, in giving judgment, said: "Undoubtedly, where a party has notice of a deed, which from the nature of it must affect the property, or is told at the time that it does affect it, he is considered to have notice of the contents of that deed and of all other deeds to which it refers." That covers this case, and we rely on it.

(1) 1 Hare, 43, 55. (2) 1 Ph. 244, 253-4.

These defendants were told of the assignment, and they paid on it. It was their voucher. It was a deed which necessarily affected the property, and if they had looked at it, as they were bound to do, they would have found out about the plaintiff's charge, and they cannot now be heard to say that they were ignorant of the facts. The plaintiff is entitled to the relief she asks.

Jessel, K.C., and *Stokes*, for the defendants. The plaintiff and those through whom she claims have been guilty of gross negligence themselves, and are not entitled to the relief they ask. The defendants did not know of the existence of the plaintiff's mortgage, and their ignorance was due entirely to the laches of the plaintiff and her predecessors in title. By the omission to give the defendants notice they were never made trustees for the plaintiff, and that omission is fatal to her claim. The defendants were bound to inquire as between themselves and their cestuis que trust, but not as between themselves and third parties.

The defendants had no constructive notice of the mortgage. Nichols, the solicitor, being fraudulent, no notice can be imputed to the defendants through him. He deliberately abstained from giving the defendants notice, and then induced them to believe that he was the real assignee. Even if the defendants had asked him about the mortgage, there can be no doubt that he would have deceived them and told them it had been paid off.

In *Dearle* v. *Hall* (1), approved in *Lloyd's Bank* v. *Pearson* (2), Plumer M.R. goes into the reasons for the loss of priority on the assignment of an equitable chose in action, and what he says is directly applicable here. The plaintiff is not entitled to relief against her own negligence; she has not perfected her title, and by omission to give notice she has not made her right attach upon the trust fund.

Banfather's Claim (3) was a case where a fraudulent solicitor was acting for all parties, and the omission to give notice was held to be the governing principle and to deprive the mortgagee of his rights against the mortgagor; and another instance is *Roper's Claim.* (4) There is no obligation on the trustees to make inquiry

(1) (1823) 3 Russ. 1.
(2) [1901] 1 Ch. 865.
(3) (1880) 16 Ch. D. 178.
(4) (1880) 50 L. J. (Ch.) 155.

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for incumbrances or for anyone who has not brought himself within the ambit of the trust. The onus is on the person, who claims to be an incumbrancer, to prove that he gave notice to the trustees, and his claim fails if he cannot discharge that onus: *Hallows* v. *Lloyd.* (1)

In *Lloyd* v. *Banks* (2) Lord Cairns L.C., in speaking of cases in which a trustee might in the absence of express notice from the incumbrancer be fixed with knowledge of the incumbrance, said: "It must depend upon the facts of the case; but I am quite prepared to say that I think the Court would expect to find that those who alleged that the trustee had knowledge of the incumbrance had made it out, not by any evidence of casual conversations, much less by any proof of what would only be constructive notice—but by proof that the mind of the trustee has in some way been brought to an intelligent apprehension of the nature of the incumbrance which has come upon the property, so that a reasonable man, or ordinary man of business, would act upon the information and would regulate his conduct by it in the execution of the trust." We submit that the plaintiff has not brought herself within the doctrine there laid down. That case was quoted and approved in *Saffron Walden Second Benefit Building Society* v. *Rayner.* (3)

Jones v. *Smith* (4) was not a case between trustee and cestui que trust, but between two equitable claimants, and the test there was confined to facts that would *necessarily* give notice. The doctrine of constructive notice has been fined down and limited, and ought not to be extended: *Ware* v. *Lord Egmont* (5); *Molyneux* v. *Hawtrey.* (6) *Kennedy* v. *Green* (7) and similar cases shew that in the case of a fraudulent solicitor the client who employs him ought not to be fixed with constructive notice of the fraud.

KEKEWICH J. This is a hard case on the defendants, the trustees, and they are justified in fighting it to the utmost.

(1) (1888) 39 Ch. D. 686.
(2) (1868) L. R. 3 Ch. 488, 490.
(3) (1880) 14 Ch. D. 406.
(4) 1 Hare, 43; 1 Ph. 244.
(5) (1854) 4 D. M. & G. 460.
(6) [1903] 2 K. B. 487.
(7) (1834) 3 My. & K. 699.

In much that their counsel said on their behalf I entirely concur. In the first place, with reference to the doctrine of constructive notice, it has been said again and again by eminent judges, for judicial generations, that it ought not to be extended. But that is no reason for frittering away principles which have been laid down and adopted by the Courts. Non-extension is quite a different thing from frittering away.

Then it was said that, Nichols being the rogue in the case, no notice could be properly given through him, because it cannot be supposed that he would have passed on notice which would have disclosed his plans and defeated his own title. He was the author of the whole villainy, and to disclose this villainy would, of course, have defeated his object. So far, I entirely agree that there is no case for imputing notice to the trustees through Nichols of that which an honest solicitor might be supposed to have stated to trustees, and which the trustees might be supposed to have known through him, even although they knew it not.

Also, I entirely concur in the proposition that the trustees occupy a fiduciary position only to their cestuis que trust, that is to say, to their original cestuis que trust, and to those who are brought within that description by assignment, devolution, operation of law, and so forth; it is the business of those who claim as assignees, or as otherwise representing the original cestuis que trust, to give notice to the trustees of their title, and if they fail to do that, they may find a difficulty in insisting on their title—for instance, if some other assignee has come forward in the meantime and proved a subsequent title to theirs, it may be, under certain circumstances, that their prior title would fail by reason of their negligence to give notice. But it is going much too far to say that trustees may not have cestuis que trust otherwise than by reason of notice from those who claim to fill that character. The trustees may find out, aliunde, the existence of other cestuis que trust who have not given them notice, and when once they know of it they are bound to recognize their new cestuis que trust, at any rate for the purpose of inquiring what is due to them or whether their title is well founded.

I think that the trustees are wrong in this case on a very

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short ground. They were called on to distribute their trust fund, and to pay over one share to the assignee of one of the original cestuis que trust. That necessarily set them on inquiry how he came to be such assignee, and they were bound to satisfy themselves that the alleged assignee had a good title to the share in question. If in the course of that inquiry they reasonably would have come across notice of anything defeating that assignee's title, then they are affected with notice of that, notwithstanding that by the negligence of an agent or for any other reason, they really never knew anything about it. That is the doctrine laid down in *Jones* v. *Smith* (1) and followed by the Courts ever since.

What happened here was this, the trustees left the investigation of this matter to a solicitor who cheated them—that is to say, they employed an agent who did not do his duty. That is a misfortune so far as they are concerned. They had no reason to suppose that he was otherwise than an honest man; but unfortunately they employed a fraudulent agent, and they cannot now shelter themselves behind that and say, "Because we employed a fraudulent agent, therefore we are not responsible for not having performed our duty." The duty of the trustees was to satisfy themselves that the person who claimed as assignee was in truth an assignee, and had a good title. If they had done that themselves, or through a competent agent, they would, of course, have required him to produce his deed of assignment, which would have disclosed on the face of it that there was a charge prior to that assignment.

It is said that the deed of assignment would have disclosed nothing but the charge, and that the defendants would have known nothing about it except that there was a legal charge, and they would not have been told whether it was paid off or not. That is perfectly true; but in accordance with their reasonable duties as trustees possessed of money which they were about to distribute amongst other persons, they would have been obliged to inquire what that charge was, and their obvious and plain duty would have been to say, "We cannot pay you, the assignee, until we are satisfied that this charge is out of the way and that there is nothing due

(1) 1 Hare, 43; 1 Ph. 244.

in respect of it." It is no answer to that to say that if they had asked Nichols, their solicitor, about it, he would have told them, as I have no doubt he would, either that there was no charge or that the charge had been paid off. It was their misfortune that they employed a fraudulent agent, but trustees must take the burden of employing improper agents. They are entitled to employ solicitors in business that requires legal advice, and they are left entirely at large in the selection of the agents they employ; but to say that they are not responsible for the fraud of their own agent in a case of this kind would be to give trustees the power of employing agents and yet give them no responsibility. To a certain extent they avoid responsibility by employing solicitors, or any other agent; but the agent they employ in the inquiry is theirs, and they must be responsible for the result of it. If they had pursued this inquiry with reasonable diligence themselves, or if a competent agent had done it with reasonable diligence, they must have had, not constructive notice, but direct notice of the charge, and that notice would have imposed upon them the duty of ascertaining what the charge was and taking care that the money was not paid over until the charge was satisfied.

This is a hard case, but it seems to me that on that short ground, while admitting there is a good deal in their favour, I should be departing from the fixed rules if I held that the defendants were not responsible.

Jessel, K.C., then asked that the defendants might be relieved from personal liability by virtue of s. 3, sub-s. 1, of the Judicial Trustees Act, 1896, and referred to *National Trustees Co. of Australasia* v. *General Finance Co. of Australasia.* (1)

KEKEWICH J. My judgment against the defendants in this case proceeded on the ground that they were cheated by their solicitor. They employed a solicitor to advise them who were the proper parties to receive this share of the trust fund; and, under his advice I assume, they paid it over to the assignee of the original cestui que trust, notwithstanding that there was

(1) [1905] A. C. 373.

KEKEWICH J. 1907 DAVIS v. HUTCHINGS.

distinct notice on the face of that assignment of a mortgage by the assignor in favour of a third person, namely, the plaintiff who is now suing. That fact was not disclosed by the solicitor, not because of any incompetence on his part, and certainly not because he was not aware of it, but because he was himself the assignee, and it was to his interest to get the money and to allow or advise his clients, the trustees, to pay it to him, notwithstanding that there was an outstanding claim. Under those circumstances the question now arises, Did the trustees act honestly and reasonably, and ought they fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which they committed such breach?

The value of the case in the Privy Council (1), to which Mr. Jessel has referred on this point, is this: that it shews that the Court is bound to consider the whole of the provisions of the Act, and cannot absolve a trustee simply because he has acted honestly and reasonably. In this case the trustees have acted honestly—there is not the slighest imputation on their honesty. They intended to do what was right, and in the right manner. They have also, in one sense, acted reasonably. A question arose respecting the distribution of the trust fund among the parties entitled to it, and they did as all prudent trustees would do under such circumstances—they employed a solicitor (a man they believed to be competent and sound) to advise them as to whom the money was to be paid, and to prepare the necessary documents. So far they acted reasonably. No possible question arose, so far as they were concerned, as to whether the assignee was entitled or the mortgagee, because they did not know of the mortgage; and therefore I am not called on in this case to consider whether they were guilty of any negligence, or want of reasonable care, in omitting to obtain the direction of the Court in the matter in which the breach was committed.

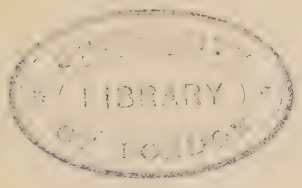
But ought they fairly to be excused for the breach of trust? I am only repeating what I said in giving judgment on the main part of the case when I say that I think they ought not. It is impossible to say that they ought to be excused without departing from well-established rules. I should not be sorry if we had the

(1) [1905] A. C. 373.

guidance of the Court of Appeal as to the meaning of the words; but I have expressed the opinion, again and again, and I am not doing so now without reflection—that if a trustee has, without any default of his own, employed a defaulting agent, whom be believed to be a competent man, to do certain work, and, whether competent or not, the agent turns out to be fraudulent and gets the trustee into a scrape, the trustee cannot shelter himself behind that. Why ought he to be let off? A trustee who employs an agent must, according to the ordinary rules of law, be responsible for the acts of the agent. I do not believe it was the intention of the Legislature that he should be let off that. This case occurs to me: A question arises on the construction of a will whether, on a gift to nephews and nieces, the nephews and nieces of the wife as well as of the testator are intended to be included. The trustee takes the opinion of eminent counsel, and is advised that the class is restricted to the nephews and nieces of the testator. No doubt he might take the opinion of the Court, and perhaps be held liable for omitting to take it; but does the taking of the opinion of eminent counsel save him from any liability if, in the event, it be determined that the nephews and nieces of the wife, on the proper construction, are included in the gift? I cannot conceive that the Act was intended to apply to a case of that sort. That is not my view of the Act, and this is not so strong a case as the illustration I have just given.

Solicitors: *Hardisty, Rhodes & Hardisty*; *Pownall & Co.*

R. M.



KEKEWICH J.

1907

Feb. 1, 8.

COPESTAKE *v.* HOPER.

[1906 C. 679.]

Heriot—Freehold of Manor—Tenant—"Dying seised"—Mortgage—Mortgagor in Possession.

A mortgagor in possession of a freehold tenement within a manor is so "seised" of that tenement that, on his death, the lord of the manor is entitled to claim his best beast as a heriot, pursuant to the custom of the manor.

The plaintiff Sampson Copestake was lord of the manor of Ewhurst, in the county of Sussex, and was seised thereof in fee simple in possession. Within the manor there were several ancient freehold tenements held of the lord by fealty, suit of court, an annual quit rent, a relief of one year's rent on the death of the tenant or alienation of the tenement, and a heriot of the best beast of the tenant on his death. These ancient freeholds were conveyed by ordinary assurances which did not require enrolment on the court rolls of the manor, nor was any licence of the lord to alienate, or notice to the lord of death or alienation, necessary. But as deaths or alienations were brought to the knowledge of the homage, presentments were made by them and enrolled in the court rolls of the devolutions of the interests of the tenants of these ancient freeholds. On October 5, 1863, one of these ancient freeholds within the manor, known as Capons, devolved, by virtue of an alienation by one Edward Penfold, upon Richard Hoper, of Cowfold, in the county of Sussex, who thenceforth held the same of the said manor freely to him and his heirs by fealty, suit of court, a quit rent of 1*l.* 0*s.* 10*d.* per annum, a relief of one year's rent on his death or alienation, and a heriot of his best beast on his death.

By an indenture of statutory mortgage dated November 1, 1887, Richard Hoper conveyed the said tenement unto and to the use of the defendant Henry Herbert Browell in fee simple for securing payment on May 1, 1888, of certain principal moneys and interest therein mentioned. Richard Hoper died

on March 26, 1905, without having redeemed the said mortgage. During his life Richard Hoper paid the quit rent due in respect of his tenement. The plaintiff alleged that Richard Hoper died so "seised" as aforesaid of the tenement known as Capons, and thereupon happened to the plaintiff, as lord of the said manor, a relief of one year's rent and a heriot of the best beast belonging to R. Hoper.

On April 4, 1905, the plaintiff, by his agent, seized and marked a bay gelding called Captain, which was the property of the said R. Hoper at his death, as and for such heriot. The defendants Kate Anna Hoper and Henry Herbert Browell, as executors of R. Hoper, refused to give up the said bay gelding to the plaintiff. The plaintiff then brought his action, and claimed a declaration that he was entitled to the bay gelding as a heriot, and for delivery of the same. The defendants relied upon the mortgage, and denied that there happened to the plaintiff a relief or heriot on the death of R. Hoper. There was no instance in the manor of the presentation of a mortgagee at the court baron, or any instance of the defence of a mortgage having been set up to a claim of a heriot.

P. O. Lawrence, K.C., and *R. Burleigh Muir*, for the plaintiff. The question is whether Richard Hoper died solely seised of Capons as a tenant within the manor. It is submitted that he did, but there is no direct authority upon the point. Seisin, however acquired, is simply possession: Williams on Seisin, pp. 4, 8; and Richard Hoper was admittedly in possession of this estate of freehold at his death and paid the quit rent. There cannot be seisin without possession, and two persons cannot be seised at the same time of the same land. The mere possession of the land, therefore, is prima facie evidence of a seisin in fee. It is immaterial whether the heriot is heriot service or heriot custom, as seizure by the lord may be made in either case: Scriven on Copyholds, 7th ed. p. 244; Watkins on Copyholds, 4th ed. vol. ii. pp. 98, 101, 109–114. In the present case the mortgagor being in possession of the property, the mortgagee has only a right of entry, and the mortgagor is not in the position of agent of the mortgagee. The authorities support

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the view that an equity of redemption is an estate in land, and not a mere right only; it is "such an estate whereof there may be a seisin": *Casborne* v. *Scarfe.* (1) That case is referred to in *Heath* v. *Pugh* (2), where it was held that the effect of an order of foreclosure absolute was to vest the ownership and beneficial title to the mortgaged land for the first time in the mortgagee. The relations between mortgagor and mortgagee were also discussed in the case of *Christophers* v. *Sparke* (3), where Sir Thomas Plumer said that in a Court of Equity the mortgagor was considered as the owner. In the present case the mortgagor remained seised, and the mortgagee had the right of entry only. In *Leach* v. *Jay* (4) a construction was put upon the words "die seised," which assists the contention that the mortgagor, R. Hoper, died seised of the tenement.

Jessel, K.C., and *A. J. Allen*, for the defendants. The tenant who is seised of the freehold estate is no doubt liable for the heriot, but it was the mortgagee who was strictly seised at law of this property at the death of R. Hoper, in consequence of the mortgage in fee. The word "seisin" is a technical word, and must be construed strictly. Equitable rights must be ignored in a case like this, which is one of strict legal right. When heriots were created there was no such thing as a Court of Equity. In order to make this heriot payable it was necessary that R. Hoper should be in possession of the seisin of the fee, whereas in fact the defendant, as mortgagee, was seised of the fee. The liability follows the fee. Seisin is a legal incident, and the mortgagor cannot say that the mortgagee was not entitled to possession. The possession of the mortgaged land by the mortgagor while the mortgagee did not choose to take possession was "at the will, or by the sufferance, or permission of the mortgagee, under a tacit agreement which he, the mortgagee, might determine at his pleasure": *Heath* v. *Pugh.* (5) Heriots are odious to a Court of Equity, and it will not interfere: Watkins on Copyholds, 4th ed. vol. ii. p. 109, note 2; *Wirty* v. *Pemberton.* (6)

(1) (1737) 1 Atk. 603, 605.
(2) (1881) 6 Q. B. D. 345.
(3) (1820) 2 Jac. & W. 223, 235.
(4) (1878) 9 Ch. D. 42, 44.
(5) 6 Q. B. D. 359.
(6) (1708) 2 Eq. Ca. Ab. 279.

In the case of *Trinity College, Cambridge* v. *Browne* (1) it was held that a heriot was not due at the death of a cestui que trust, but on the death of the person who had the legal estate, that is, the trustee. In the report of that case it is stated that the demurrer was allowed, but it must in reality have been overruled: Scriven on Copyholds, 7th ed. p. 250; Watkins on Copyholds, 4th ed. vol. ii. p. 114. The case is also referred to in Sir William Blackstone's reports published in 1828, in the judgment of the case of *Burgess* v. *Wheate*. (2)

In the case of the *Chancellor, Masters and Scholars of the University of Oxford* v. *Bishop of Coventry and Lichfield* (3) a question also arose as to the liability to pay a heriot of an ox. It follows from these cases that it is the legal estate which is liable for the feudal duties and incidents: Tudor's Leading Cases (Real Property), 4th ed. pp. 290, 293. The legal estate and the seisin being thus in the mortgagee, it cannot be in the mortgagor, who has only an equitable interest, and no heriot became due. The seisin cannot shift.

P. O. Lawrence, K.C., in reply. The case of *Trinity College, Cambridge* v. *Browne* (1) has no real bearing upon the present. The only question is whether the mortgagor or the mortgagee was seised of this tenement. A heriot is due upon the death of a reversioner equally as on that of a tenant in possession. It is not correct to say that there cannot be a shifting of the seisin. Until actual possession is taken by the mortgagee there is no seisin in him. His right of entry is in some respects equivalent to seisin, but it is not possession. The mortgagor here had sufficient seisin to support the plea of being solely seised.

Cur. adv. vult.

Feb. 8. KEKEWICH J. delivered the following judgment:—Is a mortgagor in possession of a freehold tenement within a manor so seised of that tenement that, on his death, the lord may claim his best beast as a heriot? That is the short question for decision, and it is strange that the industry of counsel combined with some on my own part has failed to

(1) (1686) 1 Vern. 441. (2) (1758) 1 W. Bl. 123, 141.
(3) (1613) 10 Rep. 53b, 56b.

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find a direct answer to it in any reported case or text-book. The arguments on either side may be briefly summarized thus: The advocate of the lord's claim urges that it cannot be rejected without attributing to the ownership of the legal estate greater weight than is consistent with accepted doctrine; and against him it is said that to support the claim it is necessary to give an extravagant value to possession. The weakness of the latter position lies in the negation of any value whatever in possession, for the defendant, who opposes the lord's claim, is driven to contend that the tenant on whose death a heriot would have been due was the mortgagee who never was in possession. His case rests entirely on the responsibility of the legal estate vested in the mortgagee. It is true that possession alone does not necessarily constitute seisin and that seisin may be had without actual possession. A tenant at will or for a term has no seisin, but a lessor has through his lessee, and so has an infant through his guardian. It would be useless to inquire more narrowly into these and other illustrations of the law of seisin, the exposition of which is to be found in such learned works as Pollock and Maitland's History of English Law. It is sufficient for the present purpose to say that seisin is possession of an estate of freehold, and that having once arrived at possession of that character there is no need to go further to find seisin. There is no better example of this than the oft-quoted case of the squatter who, acquiring an estate in fee simple by his own wrong, is, until his title has been confirmed by length of time, liable to be turned out by legal process, but in the meanwhile is seised. It is the man filling this character—the man seised—whose death gives the lord a title to a heriot, and I take it that if the squatter occupied freehold land within a manor, the claim of the lord to a heriot on his death would be beyond doubt. It seems to follow that a heriot is not due on the death of a cestui que trust, but on the death of a trustee, and the law is so stated in Watkins on Copyholds, 4th ed. vol. ii. p. 114, and I think also elsewhere. Reference is made in the passage cited to a case of *Trinity College, Cambridge* v. *Browne*. (1) Perusal of a note (1.) induced me to doubt the accuracy of the report and to send for the original entry

(1) 1 Vern. 441.

of the order from the Record Office. From that it appears that, instead of the demurrer having being allowed, it was overruled, and the defendant was ordered to answer the bill. We learn from the note that this was done, and it is quite possible that at a later stage or even on the argument of the demurrer (which must, I think, have been a different pleading from the answer and demurrer of which the substance is set out), the law was laid down as stated; but without further investigations of the proceedings it would be unsafe to rely on the case as an authority for it. In support of the same statement there is a further reference to a case of *Car* v. *Ellison* (1), where Lord Hardwicke says: "The security of the lord is admitting a trustee to the inheritance, by which the fines, heriots, escheats, &c., are fully secured to him." This seems to me to conclude the question as between trustee and cestui que trust. It is impossible to define a trustee of land in the ordinary sense, even though he be a bare trustee, without postulating an estate vested in him and held, not on behalf of, but as trustee for, the cestui que trust. But it is urged for the defendant that it follows as a logical consequence that a legal mortgagee, being the owner of the estate at law, is the person seised, and not the mortgagor, even though the latter remain in possession. The answer to this depends on the relative rights of mortgagor and mortgagee. These were discussed in the case always cited of *Casborne* v. *Scarfe* (2), where it was held that the surviving husband of a woman who before her marriage had mortgaged her freehold land was entitled as tenant by the curtesy because the Court considered the mortgage as only a pledge or security for the money, and as not altering the position of the mortgagor. I will not pursue the learning to be found in the books on this subject, but will content myself with referring to *Heath* v. *Pugh* (3), the judgment of the Court of Appeal in which case, delivered by Lord Selborne L.C., is exhaustive for the present purpose. He notes what has been said from time to time respecting the relation of mortgagor and mortgagee, and the endeavours to make that relation analogous to other relations

(1) (1744) 3 Atk. 73, 77. (2) 1 Atk. 603.
(3) 6 Q. B. D. 345.

KEKEWICH J. 1907 COPESTAKE v. HOPER.

from which inferences might be drawn, and says in substance what has been said elsewhere, that after all it is the relation of mortgagor and mortgagee. In describing that relation he uses this language (1): "It was of the nature of the transaction that the mortgagor should continue in possession. His possession was rightful and not by wrong." And (2): "As long as the mortgage is redeemable the effect of an order of foreclosure absolute is to vest the ownership of, and the beneficial title to, the land, for the first time, in the person who previously was a mere incumbrancer. The equitable estate of the mortgagor is then forfeited and transferred to the mortgagee." It seems impossible, as against this, to say that the mortgagor in possession is not possessed of an estate of freehold in the mortgaged premises. He is liable to be dispossessed, because the mortgagee, like a rightful owner out of possession, has a right of entry, but until exercise of that right of entry is not seised as a freehold tenant of the land. (*Leach* v. *Jay* (3), and the passage from Williams on Seisin, quoted by James L.J.) This being the correct view of the position, it is unnecessary to go further, or to discuss in detail the other points raised in argument, or the other authorities cited. I hold the plaintiff to be in the right and to be entitled to the relief claimed.

Solicitors: *Cooper, Turner & Evans, for J. F. A. Cotching, Horsham; Hunt, Currey, Nicholson & Co.*

(1) 6 Q. B. D. 359. (2) 6 Q. B. D. 360.
(3) 9 Ch. D. 42, 44.

G. M.

PERHAM *v.* KEMPSTER.

JOYCE J.

1906

[1905 P. 1580.]

Nov. 28, 29, 30; *Dec.* 20.

Mortgage—Real Estate—Equitable Mortgages—Legal Estate—Notice—Priority.

A testator, after bequeathing legacies and annuities, devised his real estate to three trustees, of whom K. was one, upon trust out of the rents and profits in aid of his personal estate to pay his debts, funeral and testamentary expenses, and the said legacies and annuities, and, subject thereto, to hold the said premises upon trust as to a certain freehold house for K., his heirs and assigns. The testator then disposed of his residue. He died in March, 1872. In September, 1872, K. assigned his interest under the will by way of mortgage to a predecessor of the plaintiff, who gave notice to K.'s two co-trustees. In 1879 K., by the death of his co-trustees, became sole trustee of the will. In 1890 he deposited the title deeds and the probate of the will with the defendants, his bankers, and executed to them a memorandum of charge to secure an overdraft, and in 1903 he executed to the bank a conveyance of the hereditaments to which the title deeds related by way of mortgage to secure the existing debt and further advances. The defendants did not know, either in 1890 or 1903, of the plaintiff's equitable mortgage, but on the occasion of their first advance the bank manager examined the deeds without professional assistance. In 1890 all the debts, legacies, and annuities had been satisfied except a trust legacy of 100*l.* bequeathed to a tenant for life (who was still living) with remainder to her children. In an action to determine the priorities of the mortgagees:—

Held, that in 1903, the trusts of the will not having been fully executed, K.'s equitable interest had not become merged in his legal estate; that the bank knowing K. to be the surviving trustee of the will, and having notice that what they took from him was part of his trust estate, took it subject to all the subsisting trusts to which it was subject, including the mortgage of 1872, and therefore had not priority over the plaintiff's earlier equitable mortgage.

J. M. Kempster by his will dated March 7, 1872, after making certain specific and pecuniary bequests and giving certain annuities, devised his real estate to William Cross, Isaac Kempster and the defendant John Kempster upon trust to receive the rents and profits and apply the same in aid of his personal estate in payment of his funeral and testamentary expenses and then in payment of the said annuities and to accumulate the residue of

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the said rents and apply the accumulations in payment of his debts and legacies, and the testator declared that the trustees should stand possessed of the said premises after payment of his debts, funeral and testamentary expenses and the annuities and legacies upon trust as to a certain freehold house known as Trafalgar Villa, in the parish of Clifton, for the defendant John Kempster, his heirs and assigns. And after declaring the trusts of other parts of his residuary estate the testator, as to all the residue of his real estate, declared that the same should be held in trust for Isaac Kempster for his life, and after his death for all the children of the said Isaac Kempster in the proportions therein named, as tenants in common. And the testator appointed the said trustees to be executors of his will.

The testator died on March 26, 1872. By an indenture dated September 7, 1872, the defendant Kempster, in consideration of 500*l.*, conveyed by way of mortgage to the predecessors in title of the plaintiff all the freehold hereditaments in possession, reversion, remainder and expectancy to which he was entitled in his own right under the said will and covenanted upon request to execute to the mortgagees all such further assurances as might be reasonably required. On the same day the mortgagees gave notice of their security to the trustees of the will other than the defendant Kempster.

William Cross died in 1875, and Isaac Kempster in 1879, thus leaving the defendant Kempster sole trustee of the will. In February, 1890, the last of the annuitants died.

On October 22, 1890, the defendant Kempster, by way of security for an overdraft from his bankers, the defendants the Wilts and Dorset Banking Company, deposited with them the title deeds of the testator's real estate relating (inter alia) to Trafalgar Villa (including the probate of the will), and executed a printed form of memorandum of charge by which he declared that the deeds were deposited as security for all sums of money thereafter to become due from him to the defendant bank and undertook upon request to execute a mortgage to the bank, and that he had not charged or incumbered the property in any way whatever. It appeared that on the occasion of this transaction the manager of the bank inspected the deeds, and without

consulting the legal advisers of the bank or taking any steps to have the title properly investigated, recommended the directors to accept the security, which was accordingly done.

On February 28, 1903, the defendant Kempster executed a printed form of mortgage to the bank purporting to be a conveyance by him as beneficial owner of the hereditaments to which the deeds related in consideration of the amount then due and further advances by way of mortgage. The bank alleged that they had no notice either in 1890 or 1903 of the plaintiff's mortgage, and they claimed to be entitled to priority over it as having the legal estate in the premises and as being holders thereof for valuable consideration without notice of the plaintiff's claim or title. In or before the year 1889 all the debts and legacies had been satisfied with the exception of a trust legacy of 100*l.*, which was bequeathed by the will to Mrs. Neate for life, with remainder to her children. Mrs. Neate was still living. It was alleged that a sum of 100*l.* had been set apart to meet this legacy, but it was not made out that there had been any proper appropriation of the amount. By this action the plaintiff, who by transfer held the mortgage of 1872, claimed an account and payment of what should be found due, and in default of payment an order for foreclosure, or in the alternative a declaration as to the priorities of the mortgages of the plaintiff and the defendant bank.

Hughes, *K.C.*, and *Ribton*, for the plaintiff. It is admitted that the plaintiff is in the same position as the original mortgagees of 1872. In 1890 his position was better than that of the defendant bank, and it is for them to shew that they are now entitled to priority. The conveyance of the legal estate to the bank in 1903 was a breach of trust by the defendant John Kempster of which the bank must be taken to have had notice. The effect of the notice given by the plaintiff's predecessors to the trustees was to make them express trustees for him. The plaintiff is entitled to priority: *Mumford* v. *Stohwasser*. (1)

Younger, *K.C.*, and *F. Thompson*, for the defendants. In 1872 the plaintiff's predecessors in title had no right to the deeds, and

(1) (1874) L. R. 18 Eq. 556.

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it is admitted that they were not guilty of any negligence in permitting them to remain in the hands of the mortgagor. But when the defendant Kempster became sole trustee, and all the trusts of the will prior to his beneficial interest had been fulfilled, there was nothing to prevent their applying to him for the deeds. No application was made by them. In those circumstances the plaintiff's equitable charge ought to be postponed to the subsequent legal mortgage of the bank. In 1903 the bank obtained the legal estate without notice, constructive or otherwise, of any charge in favour of the plaintiff. Assuming that the trusts of the will had been fulfilled in 1890, the defendant John Kempster was beneficially and absolutely entitled to Trafalgar Villa, and the bank, not knowing either of the plaintiff's charge or of any breach of trust by Kempster, cannot be deprived of the benefit of the legal estate: *Mumford* v. *Stohwasser* (1); *Pilcher* v. *Rawlins* (2); *Taylor* v. *Russell.* (3) There was no express trust as between the defendant Kempster and the plaintiff which deprives the bank of the benefit of the legal estate. The only outstanding trust under the will was the settled legacy if still subsisting, and the interest of the legacy was only in the nature of a charge. We no doubt must take subject to the trusts of the will so far as they are not carried out, but the plaintiff is not entitled to set that up against our legal estate. Where an equitable mortgagee gets in the legal estate from his mortgagor at the time of a further advance he gets it as part of his security for which he gives valuable consideration. That is different from a case where he gets the legal estate from some other source and gives no consideration for it. That distinction is clearly drawn in *Pilcher* v. *Rawlins.* (2) Where an equitable mortgagee with an agreement to execute a legal mortgage subsequently gets the legal estate from his mortgagor the legal mortgage dates back to the equitable: *Cooke* v. *Wilton.* (4)

[JOYCE J. Not where there is notice of an intervening equitable incumbrance.]

Here we had no such notice.

(1) L. R. 18 Eq. 556, 562.
(2) (1872) L. R. 7 Ch. 259.
(3) [1891] 1 Ch. 8, 29; [1892] A. C. 244.
(4) (1860) 29 Beav. 100.

[JOYCE J. The question is as to the effect of your having notice of the trusts of the will.]

Supposing that the trust legacy were satisfied, as we say it was, the bank would have got an absolutely indefeasible title. The bank was not affected with notice of any trust for the mortgagee, that being created dehors the will.

[JOYCE J. There is a further question: whether the bank had notice of the facts as they were or only as John Kempster chose to represent them.]

The real question is whether the bank had constructive notice of the prior incumbrance. We submit they had not. The bank is not prejudicially affected by reason of having omitted to make any inquiries which they ought reasonably to have made: *Taylor* v. *London and County Banking Co.* (1); *In re Castell & Brown, Ld.* (2); *Jones* v. *Smith.* (3)

Hughes, K.C., in reply. The legacy has not been satisfied by appropriation or otherwise; therefore the trusts of the will have not yet been fully performed. The plaintiff's security covers everything which the defendant Kempster could give a charge upon, and is coupled with an agreement to execute all further assurances. The memorandum of 1890 only covered what the defendant Kempster could at that time lawfully charge. Again, the deed of 1903 did not pass property of which the mortgagor was trustee. Kempster was clearly a trustee of the legal estate for the plaintiff, and he could not convey it to the bank without a breach of trust. An equitable mortgagee cannot affect prior equities by getting in the legal estate from a person who can only convey it by committing a breach of trust: *Taylor* v. *Russell* (4); *Sharples* v. *Adams* (5); *Maxfield* v. *Burton* (6); *Bailey* v. *Barnes* (7); *Carter* v. *Carter* (8); *Heath* v. *Crealock* (9); *Cory* v. *Eyre.* (10)

[*Garnham* v. *Skipper* (11) was also referred to.]

Cur. adv. vult.

(1) [1901] 2 Ch. 231.
(2) [1898] 1 Ch. 315.
(3) (1841) 1 Hare, 43, 55.
(4) [1892] A. C. 244.
(5) (1863) 32 Beav. 213.
(6) (1873) L. R. 17 Eq. 15.
(7) [1894] 1 Ch. 25, 37.
(8) (1857) 3 K. & J. 617, 639.
(9) (1874) L. R. 10 Ch. 22, 33.
(10) (1863) 1 D. J. & S. 149, 170.
(11) (1885) 34 W. R. 135.

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Dec. 20. JOYCE J. This case raises a question of priority as between incumbrancers upon the interest of the defendant Kempster in certain freehold property devised by the will of his father J. M. Kempster. [His Lordship referred to the will and continued:—] The testator died in March, 1872. In September, 1872, the defendant Kempster being one of the trustees of the will, executed an assignment by way of mortgage of his interest under the will to the predecessors in title of the plaintiff, who (as it was ultimately admitted for the purposes of this action) is in a position neither better nor worse than the original mortgagees. The assignment was a formal and elaborate document, and there could be no doubt what the mortgagees bargained for. Of this formal notice was given to the trustees other than the defendant Kempster, although such notice was not necessary to give priority over subsequent mortgagees, the rule in *Dearle* v. *Hall* (1) having no application to real estate. But as a matter of fact everything was done that could be done to secure the mortgagees and prevent any other advance being fraudulently obtained without notice of the mortgage. The mortgagees cannot be charged with the omission of any precaution that could reasonably have been expected. The notice having been given, the trustees of the will became express trustees for the plaintiff or his predecessors, quoad the interest assigned, as an incumbrance upon the equitable interest of the defendant Kempster.

By the death of the other trustees in 1875 and 1879 respectively the mortgagor became sole trustee. In February, 1890, the last of the annuitants died. In October, 1890, Kempster deposited the deeds, including the probate of the will, with the Wilts and Dorset Banking Company. The manager examined them without legal assistance, but, with the little knowledge proverbially so dangerous, himself advised the board upon the title, and the board were unwise enough to act upon his advice. The memorandum of charge that was taken was in a general form and would be open to a good deal of criticism and argument as to its effect if it were really necessary to consider it carefully. But it did not purport to be more than an equitable mortgage, and in the absence of special circumstances everyone

(1) (1828) 3 Russ. 1.

who takes an equitable charge on real estate or an assignment by way of mortgage or otherwise of a merely equitable interest gets only what the mortgagor or assignor has to give, in other words, he takes subject to all prior assignments or incumbrances. There is no question of the equitable mortgage to the bank not being subject to the security of the predecessors of the plaintiff. [His Lordship then referred to the evidence of the bank manager as to what passed between him and Kempster on the occasion of the advance, from which it appeared that no specific reference had been made to the trust legacy, and continued:—]

The defendant Kempster's account continued with the bank, and he was allowed to overdraw. In February, 1903, his account being overdrawn beyond the limit, the bank began to ask for a legal mortgage, and without any further specific advance or any consideration other than the then existing debt took a new or further security dated February 28, 1903. This, again, was a general printed form which was somewhat peculiar, and its effect in my opinion doubtful. It must be observed that at this time the trusts of the legacy were still subsisting, as is the case even now, so that the trusts of the will prior to the equitable interest of the defendant Kempster had not been fully executed. There was no merger of the equitable interest of the mortgagor in his legal estate because of (1.) the legacy, (2.) the assignment to the plaintiff's predecessors by way of mortgage, and (3.) the equitable mortgage to the bank of 1890. I consider it questionable whether the deed of February, 1903, having regard to its peculiar terms and to the fact that Kempster conveyed as beneficial owner, did in fact pass the legal estate of the trustee to the bank. Still, however that may be, there was no investigation of title, and according to the general and very necessary rule, a purchaser or mortgagee of land must be deemed to have notice of all the facts which he would have learned upon a proper investigation of title. Therefore the bank had constructive notice of the trusts of the will. Further, they had actual notice, for, as I have already said, the manager had considered the will and deeds before. Thus the bank had notice not only constructive but actual that Kempster, originally joint tenant with two others as co-trustees, had acquired his legal estate in the premises

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by reason only of surviving his co-trustees, and that he held it subject to whatever trusts affected the premises, and were still subsisting, in other words that he held the premises as trustee of the will. Consequently his possession of the deeds was no security against the existence of a previous incumbrance. His delivery to the bank of the deeds was a breach of trust, and a conveyance by him of the legal estate to the bank would be a breach of his duty as trustee. In 1903 there was no inquiry whether Kempster had already conveyed his legal estate to some one else. If anything was said at all it was nothing but a general statement by him that the provisions of the will had been fulfilled, which, if it was so stated, was untrue. But, indeed, I do not understand that any question was asked or representation made when the security of 1903 was taken. Suppose, however, that a statement was made that the legacy was provided for or discharged. The position of the legatees would not have been affected in any way by such a statement. Or suppose that while one of the annuitants was living the defendant Kempster had represented that all were dead, this could not have affected the existence of the annuity, for the payment of which the real estate was subject to a trust. In my opinion a trustee of a will or other instrument cannot destroy or prejudice the interests of his cestuis que trust by misstating or denying them, even though he also convey the legal estate to a purchaser for value or a mortgagee, if the purchaser or mortgagee knows or has notice that he is getting the legal estate from such a trustee as I have mentioned. In other words, I think upon principle that any person who takes from one whom he knows to be the trustee of a will, otherwise than under a conveyance or transfer authorized by the trusts or powers thereof, property which he knows to be part of the trust estate, takes such property subject to all the trusts and equities to which it was subject in the hands of the trustee as such. It is not in my opinion requisite that he should know or have specific notice of the particulars of these trusts and equities. In ninety-nine cases out of a hundred the trustee himself does not know and could not give them. If the law were not as I have just stated, it appears to me that no beneficiary under the trusts of a will or settlement would ever be safe.

Now inasmuch as the bank knew as they did that their mortgagor Kempster was the trustee of the will and further (though I am not certain that this is material) knew, or must be taken to have known, that the trusts of the will, in particular the trusts of the legacy, had not been fully executed, so as to discharge the testator's real estate, I hold that at and before the execution of the document of February, 1903, the bank must be taken to have known of all the then subsisting trusts to which the trust property was in fact subject in the hands of the trustee of the will, and I include in these subsisting trusts any created by assignment and incumbrances of beneficial interests of which notice had been duly given to the trustees. I take it to be clear that, Kempster being known to be the trustee of the will, if it had subsequently appeared that he was a defaulting trustee or a debtor to the estate of the testator, the property, whatever it was, assigned or conveyed to the bank by him would have remained liable, and is liable now, whatever representation may have been made to the bank upon the subject.

Again, if all three trustees had been living inquiry would have been made as to whether they had any notice of assignments or incumbrances by Kempster, and, as it was, certainly I think specific inquiry should have been made of Kempster as to assignments or incumbrances by him. A prudent solicitor acting for the bank would in the circumstances, I think, have gone further and required a statutory declaration from Kempster of no prior incumbrances. I cannot assume that if this had been done Kempster would have committed perjury, nor indeed do I know what answer he would have made to a specific and formal inquiry or requisition in writing. The bank, if properly advised, would have known that in the very peculiar circumstances they could not be absolutely secure against the possibility of there being a prior assignment or incumbrance of Kempster's equitable interest. They have, I think, only themselves to blame for going on advancing to the trustee of a will upon the security of what was either a mere equitable interest of his own or was otherwise a part of his trust estate.

The result is that there must be judgment for the plaintiff

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with costs. I may add that the case of *Jared* v. *Clements* (1) seems to me to be very pertinent to many points arising in the present case.

Solicitors: *Meredith, Roberts & Mills, for Perham & Son, Bristol; Field, Roscoe & Co., for E. F. Pye-Smith, Salisbury.*

G. A. S.

Applied. *Re* EASTES. [1948] 1 All E.R. 536. [1948] Ch. 257

Applied. *Re* FLINN. [1948] 1 All E.R. 541. Also [1948] 1 Ch. 241.

JOYCE J. 1907 *Jan.* 11, 19.

In re GARRARD.

GORDON *v.* CRAIGIE.

[1906 G. 1311.]

Will—Charity—Gift to Vicar and Churchwardens to be applied "as they shall think fit"—Validity.

A testatrix bequeathed 400*l.* to the vicar and churchwardens for the time being of K. to be applied by them in such manner as they shall in their sole discretion think fit:—

Held, that the bequest was a good charitable gift for ecclesiastical purposes in the parish.

ADJOURNED SUMMONS.

Dorothy Garrard by her will dated June 6, 1904, bequeathed the sum of 400*l.* to the vicar and churchwardens for the time being of Kington "to be applied by them in such manner as they shall in their sole discretion think fit." She also gave 100*l.* to the Kington Cottage Hospital "to be applied by the manager thereof in like manner." Then, after giving further legacies, she gave her residue to be divided between Jane Horner and "the sick and poor fund of the parish church at Cheltenham."

This was an originating summons taken out by the executors of the will for the purpose of determining the question of the validity of the bequests above mentioned. It was admitted on the hearing of the summons that the gift to the Kington Cottage Hospital was valid, and his Lordship held that the gift to the sick and poor fund of the parish church of Cheltenham was also good, and that it ought to be paid to the Official Trustee of

(1) [1903] 1 Ch. 428.

Charitable Funds and the income paid to the rector until further order.

Upon the question of the validity of the bequest to the vicar and churchwardens—

A. J. Spencer, for the summons.

Rolt, for the vicar and churchwardens of Kington. This is either a gift to the vicar and churchwardens in their official capacity for the benefit of the church, and therefore a good charitable legacy, or it is an absolute gift to them, and they take beneficially. It is submitted, however, that the former view is the correct one: *In re Delany* (1); *Gibbs* v. *Rumsey* (2); *Morice* v. *Bishop of Durham*. (3) This is a gift to the vicar and churchwardens virtute officii for religious or charitable purposes.

George Lawrence, for the Attorney-General. This is a good charitable gift. A gift to a minister as such is a charitable bequest: *Thornber* v. *Wilson*. (4) That was followed in *In re Delany*. (1) It does not matter that the trusts are not defined. On the will itself the testatrix has shewn her intention to make a charitable gift.

J. G. Wood, for the next of kin. This gift is void for uncertainty. Where there is a discretion a trust is implied. There is here no indication of what the trusts are to be: *Doe* v. *Copestake*. (5) This is a gift to certain persons not to take officially, and there is nothing to indicate what they are to do with the money. That is too vague: *Grimond* v. *Grimond*. (6) In *In re Allen* (7) the gift was for the inhabitants of a particular place; that case is therefore distinguishable. *In re Pardoe* (8) does not apply, because there the application of the fund was to be for charitable purposes. There is nothing here to indicate charity.

Edward Ford, for Mrs. Horner. This is not a gift to the vicar and churchwardens for their own benefit. There is no indication of charity, and no locality is limited: *Aston* v. *Wood*. (9) The

(1) [1902] 2 Ch. 642.
(2) (1813) 2 V. & B. 294.
(3) (1804) 9 Ves. 399; (1805) 10 Ves. 522.
(4) (1855) 3 Drew. 245; (1858) 4 Drew. 350.
(5) (1805) 6 East, 328.
(6) [1905] A. C. 124.
(7) [1905] 2 Ch. 400.
(8) [1906] 2 Ch. 184.
(9) (1868) L. R. 6 Eq. 419

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Court cannot presume a charitable intention here. If the gift be not charitable, the objects are so indefinite that it must fail.

E. Wethered, for the rector of Cheltenham.

Rolt, in reply. A trust is implied in this case from the description of the donees and the nature of their office. By the last words of the gift it is merely left to them to determine the precise objects. In *Doe* v. *Copestake* (1) the question was whether the legal estate was in the trustees; that decision does not affect this case. In *Aston* v. *Wood* (2) the trust failed because an "appended statement" could not be found.

Cur. adv. vult.

Jan. 19. JOYCE J. The matter with regard to which I reserved judgment in this case was a legacy of 400*l.* to the vicar and churchwardens for the time being of Kington to be applied by them in such manner as they shall in their sole discretion think fit. Having regard to the decision of Kindersley V.-C. in *Thornber* v. *Wilson* (3), and see *In re Delany* (4), it is clear that a legacy to the vicar for the time being of a parish is a charitable gift for the benefit of the parish for ecclesiastical purposes. The churchwardens are the officers of the parish in ecclesiastical matters, so that a mere gift or legacy to the vicar and churchwardens for the time being of a parish, without more, is a gift or charitable legacy to them for ecclesiastical purposes in the parish. It was suggested that the words in the latter part of the gift were inconsistent with its being a charitable gift, and that they implied that the vicar and churchwardens were to take beneficially. In my opinion there is no contradiction or inconsistency in the will whatever. The words "to be applied by them in such manner as they shall in their sole discretion think fit," to my mind merely direct that the particular mode of application within the charitable purposes of the legacy is to be settled by those individuals, or rather that there is power given to them to do it, subject always, of course, to the jurisdiction of the Court. Therefore I declare this to be a good charitable

(1) 6 East, 328.
(2) L. R. 6 Eq. 419.
(3) 3 Drew. 245; 4 Drew. 350.
(4) [1902] 2 Ch. 642, 646.

legacy for the benefit of the parish of Kington for ecclesiastical purposes.

Solicitors: *Holloway, Blount & Co., for H. Birch, Thame; Field, Roscoe & Co.; Helder, Roberts & Co.; The Solicitor to the Treasury; Andrew, Wood, Purves & Sutton, for T. E. Rickerby, Cheltenham.*

G. A. S.

In re HACKET.

HACKET *v.* GARDINER.

[1906 H. 3073.]

Estate Duty—Apportionment—Real Estate—Marriage Settlement—Charging Sum on Death of Settlor—Will of Settlor—Specific Devise—Incidence of Duty—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 1; *s.* 7, *sub-s.* 1; *s.* 9, *sub-s.* 1; *s.* 14, *sub-s.* 1.

On the death of an owner in fee who, by his marriage settlement, had charged his real estate with the payment after his death of a sum of money to be held on the trusts therein declared, and who, by his will, had subsequently devised the same real estate in strict settlement:—

Held, that s. 14, sub-s. 1 of the Finance Act, 1894, applied, and that his executor, having paid estate duty on the real estate, was entitled to recover from the trustees of the marriage settlement an amount equal to the proper rateable part of the estate duty in respect of the sum so charged.

ADJOURNED SUMMONS.

By his marriage settlement dated December 11, 1867, G. A. B. D. Hacket, the above-named testator, demised the Moor Hall estate, of which he was seised in fee simple, to the trustees of the settlement for the term of 1000 years from the date thereof, upon trust after his death or in his lifetime with his consent, by the ways and means therein mentioned, to levy and raise the sum of 10,000*l.*, to be held by them upon the trusts therein declared, under which the testator took the first life interest; and the settlement provided that subject to the trusts thereinbefore declared the trustees should permit the rents and profits of the said estate or such part thereof as

JOYCE J. 1907 HACKET, *In re.* HACKET *v.* GARDINER.

should not be wanted for the purpose for which the said term was created, to be received and taken by the persons who for the time being should be entitled to the same premises in reversion or remainder expectant on the term.

By an indenture dated March 17, 1884, and indorsed on the settlement, the testator charged the Moor Hall estate and also the said term of years with the payment to the trustees of the sum of 4250*l.* beyond and in addition to, and to be held upon the same trusts as, the said sum of 10,000*l.*

The testator died on July 29, 1904, having by his will, dated August 8, 1899, appointed his eldest son, the plaintiff, his executor, and devised (inter alia) his Moor Hall estate to the use of his trustees for the term of 1000 years from the date of his death and subject thereto to the use of the plaintiff for life with divers remainders over. The trusts for the term of 1000 years included a trust to raise, in case of the deficiency of his residuary personal estate, such a sum as might be required to satisfy his funeral and testamentary expenses, debts, and legacies. The testator gave the residue of his real and personal estate to the plaintiff and his brothers in equal shares.

The estate duty payable in respect of the whole of the real and personal estate of the testator had been assessed, and the plaintiff had already paid out of the testator's estate the first two instalments of the duty assessed in respect of the Moor Hall estate, the total value of which, as estimated for the purpose of assessing estate duty, did not exceed the amount of 14,250*l.*, charged upon it as above-mentioned.

The plaintiff being desirous of paying the 14,250*l.* to the defendants, who were the present trustees of the settlement, took out this summons for the determination of the question whether the estate duty payable in respect of the Moor Hall estate now vested in the defendants for the term of 1000 years upon the trusts of the settlement ought to be paid wholly out of the testator's residuary estate or whether the same ought to be borne by and paid out of the said sum of 14,250*l.*

Hughes, *K.C.*, and *Chubb*, for the plaintiff. This case falls exactly within the terms of s. 14, sub-s. 1, of the Finance Act,

1894. (1) The plaintiffs having paid the estate duty, pursuant to s. 6, sub-s. 2, on the whole estate, are entitled to recover from the defendants the trustees of the settlement the proper rateable part of the duty in respect of the property charged by the settlement: *In re Countess of Orford.* (2) By s. 9, sub-s. 1, the estate duty is a first charge on the property in respect of which it is leviable. By s. 4 all property passing on the death of the deceased must be aggregated for determining the rate of duty to be paid, and the duty is levied at the proper graduated rate on the principal value of the whole estate. *In re Countess of Orford* (2) was considered in *Berry* v. *Gaukroger* (3), and Vaughan Williams L.J. there said that that case was a distinct authority "that in all cases where the duty becomes payable for which the executor is not made accountable by s. 6, sub-s. 1, the duty must be paid ultimately by the persons beneficially entitled in proportion to their shares, and it follows that the duty cannot be thrown wholly on the residue." *In re Gray* (4) shews the distinction between the case of a charge and one where the testator is merely liable to pay a debt. Here there is a charge and the plaintiffs are entitled to recover the rateable part of the duty on the property charged.

Younger, K.C., and *Rashleigh*, for the defendants. Three kinds of debts or incumbrances are dealt with by the Act: (1.) Incumbrances on the estate of a deceased person created by mortgages for valuable consideration. Those are excluded from the Act, and no duty is payable. (2.) Incumbrances created for what would be full and valuable consideration but which have not enured for the benefit of the deceased to the full extent. For instance, where a charge is created by way of settlement. There the duty is payable irrespective of the incumbrance, but, as we

(1) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 14, sub-s. 1: "In the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty may be recovered by the person, who being authorized or required to pay the estate duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property (whether as capital or as an annuity or otherwise), under a disposition not containing any express provision to the contrary."

(2) [1896] 1 Ch. 257.

(3) [1903] 2 Ch. 116, 131.

(4) [1896] 1 Ch. 620.

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submit, the incidence of the duty is not determined by the Act. (3.) Incumbrances created by the deceased out of pure bounty. There the duty is payable by the object of the bounty. This case comes under the second class of incumbrances. It is an incumbrance for valuable consideration, and by contract the persons entitled to the benefit of it are protected from payment of the duty. If the settlement was in the form of a covenant to pay, no portion of the duty would have been recoverable from the trustees: *In re Gray.* (1) This is not a debt but an incumbrance, and not an incumbrance excepted by s. 7, sub-s. 1. The incidence of the duty should be the same as in the case of a debt. Personal and real estate are under the same liability to duty, and there is no distinction between them for this purpose. Estate duty cannot be charged on this incumbrance unless there is something in the Act which charges it and the person entitled to it with duty. Sect. 7, sub-s. 1, does not charge the incumbrance with duty; and, apart from s. 14, sub-s. 1, s. 1 is the only section which would charge an incumbrance with duty, but under that section there is no charge on any property, except such as passes on the death. Now the incumbrance in this case was created in 1867 and 1884, and the interest of the defendants—or, in other words, the incumbrance—did not pass on the death of the testator, and the fact that he took a life estate under the trusts of his marriage settlement does not affect this question at all. Therefore, this incumbrance can only, if at all, be charged with duty by virtue of s. 14, sub-s. 1, which we submit means no more than it says, and only gives a right of recourse as against the owner of the charge in cases where the charge is by some other section of the Act made liable to duty.

[JOYCE J. Are you not omitting s. 9, sub-s. 1?]

The defendants, no doubt, may have to accept the position that the Crown has a first charge on the property, but that we submit does not prevent the defendants from getting the full amount of their charge out of the property if they can. The contention of the plaintiffs would lead to this curious result, that the persons entitled to a sum of 25,000*l.* secured by the covenant of the testator, would, if he died having only real estate, have

(1) [1896] 1 Ch. 620.

recourse to the real estate for the full amount of the debt and would not have to bear any part of the duty, whereas the persons entitled to a similar sum charged on real estate by a testator who had no personalty would have to bear a proportionate part of the duty. Sect. 14, sub-s. 1, has no reference to the incidence of the duty. It is not a charging section at all, but merely provides machinery for the recovery of what has been paid under a liability imposed under some other part of the Act. In *In re Countess of Orford* (1) the question was as to the incidence of duty between the appointees of the fund.

[They also referred to *Earl Cowley* v. *Inland Revenue Commissioners* (2); *In re Meyrick* (3); *In re Maryon-Wilson* (4), *Berry* v. *Gaukroger*. (5)]

JOYCE J. In the years 1867 and 1884 the testator, being the owner in fee of the Moor Hall estate, charged certain sums on it in favour of the trustees of his marriage settlement for the purposes of that settlement, and after and subject to the creation of those charges the Moor Hall estate belonged to him in fee. The testator died in 1904 and a question has arisen between his executor and the trustees of the settlement concerning the incidence of estate duty in respect of the sums so charged.

The Finance Act, 1894, charges estate duty on all the property which passed on the death of this testator, and it is quite clear that this property, the Moor Hall estate, all the time being subject to the charges, did pass on the death of the testator.

Now s. 7, sub-s. 1, provides that in determining the value of an estate for the purpose of estate duty no allowance shall be made in respect of an incumbrance created by a disposition made by the deceased, unless such incumbrance was created bona fide for full consideration in money or money's worth, wholly for the deceased's own use and benefit, and takes effect out of his interest. It is admitted by both parties that the incumbrance in this case is one of such a nature that in determining the amount of duty leviable in respect of the Moor Hall estate the value of

(1) [1896] 1 Ch. 257.
(2) [1899] A. C. 198.
(3) [1897] 1 Ch. 99.
(4) [1900] 1 Ch. 565.
(5) [1903] 2 Ch. 116.

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the whole estate must be taken without making any allowance or deduction in respect of this incumbrance. Then s. 9, sub-s. 1, says that, "a rateable part of the estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable." The effect of that to my mind is to make a first charge on the Moor Hall estate of the amount of the estate duty levied or calculated upon the value of the whole estate without making any deduction in respect of this particular incumbrance.

In the circumstances it would seem to me to be only just and fair and right to the owners of the Moor Hall estate that a portion of the estate duty leviable on the estate should be borne by the persons entitled to the incumbrance, and further I am of opinion that this is just such a case as was intended to be covered by s. 14, sub-s. 1. [His Lordship read the sub-section and continued:]—Now it is not denied that reading that sub-section according to the plain and ordinary meaning of the English language, it applies to this case. Why then am I to say that it does not apply? Mr. Younger has instanced various cases to me and said that if such be the meaning of s. 14, sub-s. 1, the result would be strange in those cases. That may be; those cases will have to be dealt with when they arise, but I do not myself see any hardship or impropriety in the effect which it has been contended before me that s. 14, sub-s. 1, has in this case. Many authorities have been cited, but I do not think that any of them really helps me. I do not, however, find anything in them contrary to the view I have been constrained to adopt. Mr. Younger's argument seemed to me to ignore the effect of s. 9, sub-s. 1.

The result is that I think s. 14, sub-s. 1, does include this particular case. It seems to me to be the very sort of case to which s. 14, sub-s. 1, was meant to apply, and I will go even further and say that I think there would have been a defect in the legislation with respect to estate duty if the consequence for which the plaintiff has contended did not result.

Solicitors: *Peacock, Fisher & Chavasse, for A. L. Crockford, Birmingham; Long & Gardiner.*

R. M.

SWINFEN EADY J.

1907

Jan. 30.

In re WAND.

ESCRITT *v.* WAND.

[1906 W. 3577.]

Will—Residue—Aliquot Shares—Class Gifts—Forfeiture Clause—Forfeited Interest to lapse and form Part of Residue—Mode of Division.

A testator directed his trustees to stand possessed of the proceeds of sale and conversion of his residuary real and personal estate, "As to three equal seventh parts thereof" in trust for a class of persons living at his death (hereinafter called class A) as tenants in common; and "As to the remaining four equal seventh parts thereof" in trust for another class of persons living at his death (hereinafter called class B) as tenants in common. He provided that if a certain event should happen in his lifetime the share of a certain member of class A "shall lapse and form part of my residuary personal estate." The event happened and the share lapsed:—

Held, that three-sevenths of the lapsed share went to the effective members of class A and four-sevenths to class B.

ORIGINATING SUMMONS.

By his will dated October 16, 1882, a testator devised and bequeathed his residuary real and personal estate to his trustees upon trust for his wife for life, and after her death he empowered the trustees to sell the real estate, and declared that they should stand possessed of the proceeds of sale and of the residuary personal estate, "As to three equal seventh parts thereof" in trust for a class of persons living at his death (hereinafter called class A) as tenants in common, and "As to the remaining four equal seventh parts thereof" in trust for another class of persons living at his death (hereinafter called class B) as tenants in common. The testator provided that if a certain event should happen in his lifetime the share of a certain member of class A "shall lapse and form part of my residuary personal estate." This event happened in the testator's lifetime.

The testator died on September 5, 1884.

His wife died on January 30, 1906, and the fund became divisible.

In the events that happened there were three members of

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class A, counting the member whose share had lapsed, and four members of class B.

This summons was issued to determine how the fund was to be divided.

Henry Wace, for a neutral trustee.

J. G. Wood, for a member of class B. The member whose share has lapsed must be counted in class A for the initial determination of the lapsing share, but excluded from the class taking under the accruer clause. The lapsed share is therefore one-seventh, three-sevenths of which go to the two effective members of class A and four-sevenths to the four members of class B. The two effective members of class A therefore take $\frac{2}{7} + \frac{3}{7} \cdot \frac{1}{7} = \frac{17}{49}$ between them, and the four members of class B take $\frac{4}{7} + \frac{4}{7} \cdot \frac{1}{7} = \frac{32}{49}$ between them: *In re Palmer*; (1) *In re Allan*. (2)

Harold Hind, for another member of class B. The member whose share has lapsed must be counted in class A throughout, with perpetual lapse accruer and sub-division. This will give $\frac{2}{7} + \frac{2}{7} \cdot \frac{1}{7} + \frac{2}{7} \cdot \frac{1}{49} + \ldots = \frac{2}{6}$ to the effective members of class A and $\frac{4}{7} + \frac{4}{7} \cdot \frac{1}{7} + \frac{4}{7} \cdot \frac{1}{49} + \ldots = \frac{4}{6}$ to class B: *In re Ballance*. (3) If the member whose share has lapsed had been the only member of class A, so that three-sevenths lapsed, the other constructions proposed would result in a partial intestacy, whereas this construction would carry the whole by perpetual accruer to class B.

Ashton Cross, for an effective member of class A. The member whose share has lapsed was in the event never a member of the class, and must be excluded ab initio. The so-called effective members of class A constitute the whole of class A, and take three-sevenths of the residue between them. The members of class B take four-sevenths between them.

SWINFEN EADY J. (after stating the facts). It is not disputed that the four members of class B take four-sevenths equally between them. The remaining three-sevenths were given to

(1) [1893] 3 Ch. 369. (2) [1903] 1 Ch. 276.
(3) (1889) 42 Ch D. 62, 64.

class A. There are three members of this class, two of whom take one-seventh each. With regard to the third member, the testator provided that if a certain event should happen in his lifetime that member's share "shall lapse and form part of my residuary personal estate." That event in fact happened. The share therefore lapses and forms part of the residuary personal estate. The question is how that seventh share is to be divided. In my judgment it must be divided according to the trusts of the residuary personal estate. Four-sevenths of the lapsed seventh will therefore go to class B. Three-sevenths of the lapsed seventh go to class A, from which class the member whose share has lapsed is now to be excluded. The two effective members of Class A therefore take $\frac{2}{7} + \frac{3}{7} \cdot \frac{1}{7} = \frac{17}{49}$ between them, or $\frac{17}{98}$ apiece. The four members of class B take $\frac{4}{7} + \frac{4}{7} \cdot \frac{1}{7} = \frac{32}{49}$ between them, or $\frac{16}{98}$ apiece.

Declaration accordingly.

Solicitors: *Routh, Stacey & Castle, for Henry Thompson & Sons, Grantham; Mason & Co., for Beaumont & Goodall, Nottingham.*

G. R. A.

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1907

Feb. 5, 6, 7.

In re WILSON.

MOORE *v.* WILSON.

[1906 W. 3504.]

Life Tenant and Remainderman—Unauthorized Securities—Express Power to retain—Enjoyment in Specie.

Where a will contains no trust for conversion, and the life tenant of residue (or of a legacy) is given the entire income thereof, he is entitled to the income of unauthorized permanent securities retained (and appropriated) by the trustees under a power of retainer (and appropriation).

In re Sheldon, (1888) 39 Ch. D. 50, and *In re Bates*, ante, p. 22, followed.

In re Chaytor, [1905] 1 Ch. 233, distinguished.

ORIGINATING SUMMONS.

By his will dated May 27, 1890, a testator, after appointing Moore, Henderson and Paul trustees and executors thereof and bequeathing legacies to his wife, his niece Alice and others, made (inter alia) the following provisions:—

"6. I give to my trustees the sum of 100,000*l.* upon trust to invest the same upon such securities as trustees are or may be by law authorized to invest in, with power from time to time to vary the investments thereof, and to pay the income to my said wife during her life, and after her death the said sum of 100,000*l.* and the investments thereof, subject to or in default of any appointment or disposition to be made by her as authorized by the next clause, shall fall into and form part of my residuary estate.

"7. I declare that my said wife shall have power to appoint or dispose of by will or codicil the sum of 20,000*l.* part of the said sum of 100,000*l.* mentioned in the last preceding clause or any less sum."

14. This was a clause referring to another trust legacy.

"23. I give to the said . . . . Moore and . . . . Henderson who are hereinafter designated as the 'Alice trustees' all the rest residue and remainder of my estate and effects whatsoever and wheresoever upon trust to invest the same upon such securities as trustees are or may be by law authorized to invest

in, with power from time to time to vary the investments thereof, and to pay the income to my said niece Alice . . . . during her life and after her death to stand possessed of the said residue and remainder of my estate and effects and the investments thereof, subject to or in default of any appointment or disposition to be made by the said Alice . . . . as authorized by the next clause, upon trust for her children or remoter issue or for any one or more of them exclusively of the other or others and generally in such manner as the Alice trustees shall in their discretion think best . . . ." There was no ultimate trust in default of issue.

" 24. I declare that my said niece Alice . . . . shall have power to appoint or dispose of by will or codicil all or any part of the rest residue and remainder of my estate and effects and the investments thereof mentioned in the last preceding clause.

" 25. I authorize my trustees in their absolute uncontrolled discretion and as regards the gifts or bequests mentioned in clauses 6, 14 and 23 of this my will, notwithstanding the directions for investment therein respectively contained, to continue all or any part of my estate on the investments existing at my decease, whether the same shall be such as trustees may invest on or not, and also to apportion and set apart any part or parts of my investments to answer specific sums hereunder and after such apportionment and setting apart the person or persons interested in the sum or sums represented shall be entitled to all the increase and be liable to all the decrease if any without reference to my residuary or other estate, as I am satisfied that my trustees will do the best for all parties according to their judgment and they shall not be answerable for errors of judgment as regards continuing or making investments or otherwise in relation to my estate."

The testator died on June 14, 1891.

His estate consisted largely of non-trust securities, many of which were retained by the trustees. No wasting securities were retained. There was no real estate. The wife's 100,000*l.* settled legacy was appropriated partly out of authorized and partly out of unauthorized securities retained, and she was paid the whole income of the authorized and 4 per cent. per annum on the

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value of the unauthorized securities as ascertained at the date of appropriation. The accumulation of surplus income now amounted to 7700*l.* Alice had been paid the whole income of the authorized securities forming part of the residue, and 4 per cent. per annum on the value of the unauthorized securities retained as ascertained at the testator's death. The accumulation of surplus income now amounted to 9500*l.*

This course had been adopted in accordance with an eminent counsel's opinion dated March 23, 1892. He said (inter alia): "I cannot in this case discover on the face of the will any intention that the tenant for life of the residue should be entitled to the whole actual income of unauthorized investments the conversion of which the trustees postpone in the exercise of their discretionary power in that behalf. Such cases therefore as *In re Sheldon* (1) and *In re Thomas* (2) are distinguishable." He was not asked to advise as to the legacy, but the trustees considered that the same principle applied. The opinion was shewn to the life tenants of the legacy and the residue, but no formal consent to the course adopted was obtained.

After the decision of Kekewich J. in *In re Bates* (3) on October 31, 1906, the general trustees and the Alice trustees (now the same persons) issued this summons to determine whether the above course was correct, and for consequential directions as to the accumulations and future income.

Baker-Wilbraham, for the trustees.

Sargant, for the life tenants of the legacy and the residue. There is no trust for conversion, so the case rests on the rule in *Howe* v. *Earl of Dartmouth* (4), restated in *Macdonald* v. *Irvine*. (5) Now that rule is confined to residue, and does not affect the settled legacy. Clause 6 clearly gives the income of the legacy to the life tenant thereof, and clause 25 says that, notwithstanding the direction for investment in clause 6, the trustees may retain the testator's non-trust investments and appropriate the legacy thereout. The life tenant is clearly entitled to the whole income

(1) 39 Ch. D. 50.
(2) [1891] 3 Ch. 482.
(3) Ante, p. 22.
(4) (1802) 7 Ves. 137a; 1 W. & T. 7th ed. p. 68.
(5) (1878) 8 Ch. D. 101, 112.

of the appropriated fund. The residue is not quite in the same position, owing to the rule in *Howe* v. *Earl of Dartmouth*. (1) But that rule yields to the testator's intention : *Hinves* v. *Hinves*. (2) Now clause 23 gives the income of the residue to Alice. It does not merely give her the income of the investments. Clause 25 authorizes the retention of any of the testator's investments, and while retained they clearly form part of the residue. Alice is therefore entitled to the income: *Gray* v. *Siggers* (3); *In re Sheldon* (4); *In re Thomas* (5); *In re Bates*. (6)

In *In re Chaytor* (7) there was a trust for conversion, and the life tenant was only given the income of the proceeds of conversion. There was no general gift of the income of the residue, or any gift of the income pending conversion, so that, although the trustees had power to postpone conversion and retain unauthorized securities, the life tenant was only entitled to the income of them as notionally converted at the testator's death. That case has no application to the present.

Whitmore Richards, for next of kin presumptively entitled to the capital. On the true construction of the will the life tenants are only given the income of the trust investments, and not the income of the legacy or residue. The power to retain is only for the benefit of the estate, and does not entitle the life tenants to the income of unauthorized securities: *Porter* v. *Baddeley*. (8) The general rule in *Howe* v. *Earl of Dartmouth* (1) ought not to be broken upon slight grounds : *Blann* v. *Bell* (9); *Re Eaton* (10).

Sargant, in reply. In *Blann* v. *Bell* (9) and *Re Eaton* (10) there was no power to retain. In *Porter* v. *Baddeley* (8) the securities were wasting securities.

[SWINFEN EADY J. They were part of the residue, and there was power to retain them. Why should there be any distinction between hazardous and wasting securities on this point ?]

The distinction was taken by North J. in *In re Sheldon*. (4) There are no wasting securities here, so it is unnecessary to

(1) 7 Ves. 137a; 1 W. & T. 7th ed. p. 68.
(2) (1844) 3 Hare, 609.
(3) (1880) 15 Ch. D. 74.
(4) 39 Ch. D. 50.
(5) [1891] 3 Ch. 482.
(6) Ante, p. 22.
(7) [1905] 1 Ch. 233.
(8) (1877) 5 Ch. D. 542.
(9) (1852) 2 D. M. & G. 775, 779.
(10) (1894) 70 L. T 761.

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consider the conflict between *Porter* v. *Baddeley* (1) and *Gray* v. *Siggers*. (2)

Cur. adv. vult.

Feb. 7. SWINFEN EADY J. I am of opinion that, according to the true construction of this will, the life tenant of the 100,000*l.* legacy is given the entire income of that legacy, and the life tenant of residue is given the income of the entire residuary estate. In other words, they are given the income of the 100,000*l.* legacy and the residue respectively, and not merely the income of the proceeds of sale when invested.

The will does not contain any trust for sale. The testator authorizes his trustees "to continue all or any part of my estate on the investments existing at my decease, whether the same shall be such as trustees may invest on or not, and also to apportion and set apart any part or parts of my investments to answer specific sums hereunder and after such apportionment and setting apart the person or persons interested in the sum or sums represented shall be entitled to all the increase and be liable to all the decrease if any without reference to my residuary or other estate."

The case is not like *In re Chaytor* (3) before Warrington J., where there was a trust to convert and there was only a gift of the income of the proceeds of conversion.

In these circumstances I am unable to distinguish the present case from *In re Sheldon* (4), before North J., and *In re Bates* (5), before Kekewich J.

The result is that the whole income of the securities set aside to answer the 100,000*l.* legacy is payable to the life tenant of that legacy, and the whole income of the residuary estate is payable to the life tenant thereof. The respective accumulations of income or the investments representing the same must be handed over to the respective life tenants. Having regard to the magnitude of the estate, the costs may come out of the accumulations.

Solicitors: *St. Barbe Sladen & Wing; Clarkson, Greenwell & Co., for Damant & Sons, Cowes.*

(1) 5 Ch. D. 542.
(2) 15 Ch. D. 74.
(3) [1905] 1 Ch. 233.
(4) 39 Ch. D. 50.
(5) Ante, p. 22.

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In re OPPENHEIMER.
OPPENHEIMER *v.* BOATMAN.

[1907 O. 44.]

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1907
Feb. 19, 20.

Apportionment—Dividends on Shares—Company's Articles—Express Stipulation against Apportionment — Apportionment Act, 1870 (33 & 34 *Vict. c.* 35), *s.* 7.

A testator bequeathed certain shares in a company to his trustees upon trust to pay "the income arising therefrom" to his wife for life.

The testator died on January 4, 1906.

Some time after his death a dividend for the financial year ending October 31, 1905, was declared. The full dividend for the next financial year was not yet declared.

The company's articles provided (inter alia) as follows:—

Article 90: "Every dividend, whether arising from past or current profits, shall for all purposes be deemed to accrue and fall due upon the day on which it is declared, and not before."

Article 91: "Every dividend shall belong and be paid (subject to the company's lien) to those members who shall be on the register at the date when every such dividend is declared, notwithstanding any subsequent transfer or transmission of shares":—

Held that, as between the testator's estate and the widow, these articles did not amount to an express stipulation against apportionment within s. 7 of the Apportionment Act, 1870, and the dividends were therefore apportionable.

Whether the express stipulation referred to in s. 7 can be contained elsewhere than in a will or other instrument of gift, *quære.*

ORIGINATING SUMMONS.

By his will dated January 2, 1906, a testator gave all his shares in Oppenheimer, Son & Co., Limited, to his trustees upon trust (subject to a proviso that had not taken effect) to pay "the income to arise therefrom" to his wife until his son Kenneth, born February 18, 1887, should attain twenty-one, and upon his attaining that age to transfer to him 500 of the ordinary shares absolutely. And as to the remainder of the said shares (both preference and ordinary), upon trust to pay "the income arising therefrom" to his wife during her life, and after her death (or cesser of interest under the said proviso) to

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stand possessed of the said shares "and the income arising therefrom" upon trust for such of the testator's children as should attain twenty-one in equal shares.

The will contained no residuary bequest.

The testator, who was the founder, managing director, chairman, and largest shareholder of the company, and one of the signatories to the memorandum and articles, died on January 4, 1906.

Some time after his death a dividend for the financial year ending October 31, 1905, amounting to 2274*l.* on the testator's holding, was declared by the company. An interim dividend for the next financial year had been declared, but the full dividend was not yet declared.

The company's articles, under the head of "Dividends and Reserve Fund," provided (inter alia) as follows:—

Article 90: "Every dividend, whether arising from past or current profits, shall for all purposes be deemed to accrue and fall due upon the day on which it is declared, and not before."

Article 91: "Every dividend shall belong and be paid (subject to the company's lien) to those members who shall be on the register at the date when every such dividend is declared, notwithstanding any subsequent transfer or transmission of shares."

The widow issued this summons to determine (inter alia) whether the dividends declared since the testator's death belonged to her as income, or whether they were apportionable under the Apportionment Act, 1870, so that the whole dividend for the financial year ending October 31, 1905, and an apportioned part of the accruing dividend for the following year belonged to the testator's estate and were undisposed of.

Hon. E. C. Macnaghten, K.C., and *Maugham*, for the widow. These dividends would prima facie be deemed to have accrued by equal daily increment during the periods in respect of which they were declared, and would be apportionable accordingly: Apportionment Act, 1870, ss. 2, 5. But s. 7 provides that the Act shall not extend to any case in which it is "expressly stipulated that no apportionment shall take place." In the

present case there is such an express stipulation. The testator bequeaths the shares to his trustees upon trust to pay the income arising therefrom to his wife for life. From his position as managing director and chairman he was fully acquainted with the articles, to which he was a signatory, and no doubt he relied on them. In any case it is necessary to refer to them to see what the shares and income were. Now, article 90 provides that every dividend shall for all purposes "be deemed to accrue" and fall due upon the day on which it is declared, and not before. This takes the case out of the Act.

[SWINFEN EADY J. Must not the express stipulation be found in the will or other instrument of gift? Is there any reported case in which it was contained in a company's articles?]

There does not seem to be any case directly in point, but the somewhat analogous question as to whether a bonus is capital or income depends on how it is declared by the company: *Bouch* v. *Sproule.* (1)

Eve, K.C., and *W. E. Vernon*, for the children. The express stipulation, if any, must be contained in the will. The articles are irrelevant on this point. Articles 90 and 91 are merely declaratory. In any case they only affect the rights as between the shareholder and the company, and not the rights as between the shareholder's estate and his legatees. The testator could clearly have directed an apportionment notwithstanding the articles. A mere inference collected from the general terms of the will is not sufficient to exclude the Act: *Tyrrell* v. *Clark.* (2) There must be some express stipulation, such as a declaration that the shares bequeathed shall carry the accruing dividend, as in *In re Lysaght* (3), or a direction that "the whole of the income derived" from the shares shall be paid to the legatee, as in *In re Meredith.* (4)

J. E. C. Adams, for neutral executors and trustees.

Stokes, for another party.

Hon. E. C. Macnaghten, K.C., in reply. *In re Lysaght* (3) and *In re Meredith* (4) are merely examples of express stipulations in

(1) (1887) 12 App. Cas. 385, 397, 401.
(2) (1854) 2 Drew. 86.
(3) [1898] 1 Ch. 115.
(4) [1898] W. N. 48; 67 L. J. (Ch.) 409.

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wills. They do not shew that an express stipulation cannot be contained in a company's articles. The provision that every dividend "shall for all purposes be deemed to accrue" upon the day it is declared, and not before, is more than declaratory, and is expressly contrary to ss. 2, 5. If the testator had directed an apportionment, it would have been an apportionment under the will, not under the Act. As he has not done so, he must be taken to have bequeathed the shares, subject to the provisions of the articles, which in effect exclude the Act.

SWINFEN EADY J. (after stating the facts). The dividends on these shares are apportionable under the Apportionment Act, 1870, unless pursuant to s. 7 it is "expressly stipulated that no apportionment shall take place." The question is whether there is any such express stipulation in this case. The widow placed great reliance on article 90, one of the articles under the heading "Dividends and Reserve Fund." It provides that "Every dividend, whether arising from past or current profits, shall for all purposes be deemed to accrue and fall due upon the day on which it is declared, and not before." The widow contended that this amounted to an express stipulation against apportionment within s. 7.

It is followed by article 91, which provides that "Every dividend shall belong and be paid (subject to the company's lien) to those members who shall be on the register at the date when every such dividend is declared, notwithstanding any subsequent transfer or transmission of shares."

Now those articles only embody and state in terms what the law already implies. It is no doubt convenient to have these regulations formally expressed, but the law would be just the same if they were not there.

Thus, quite apart from article 90, a dividend accrues and falls due upon the day it is declared, and not before, and profits earned, though assets, are not available for dividend till so declared.

In my view these articles, though binding the shareholders, merely define and state the legal position as between them and the company. A shareholder can deal with the dividends on his shares and effect or prevent apportionment notwithstanding the

articles. In *In re Meredith* (1) North J. said: "It was not the object of the Act to prevent a man from disposing of the whole of the dividends if he wishes to do so; there was clear power left to a testator to deal with accruing dividends exactly as he liked."

It would be a curious position if a company's articles could contain an express stipulation against apportionment, and the will could nevertheless provide for apportionment. In any case these articles do not amount to an express stipulation against apportionment as between life tenant and remainderman, or in the present case as between the testator's estate and the widow, and there is no express stipulation in the will. The Act, therefore, not being excluded, the ordinary rule applies, and the dividends must be apportioned between the testator's estate and the widow.

Solicitors: *Hon. F. F. Macnaghten; Kimbers & Boatman; Hill, Son & Rickards.*

(1) [1898] W. N. 48; 67 L. J. (Ch.) 409, 410.

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1907

Jan. 22, 23.

LIDBETTER *v.* HATCH.

[1905 L. 2338.]

Ecclesiastical Law—Vicarage—Sale—Purchase of new Vicarage with Proceeds—Loan of Balance of Purchase-money—Completion of Purchase—Mortgage of Revenues of Benefice to secure Loan—Validity—Lien—Clergy Residences Repair Act, 1776 (17 *Geo.* 3, *c.* 53), *ss.* 1, 4, 10—*Parsonages Act*, 1838 (1 *& 2 Vict. c.* 23), *s.* 1.

Where under the provisions of the Clergy Residences Repair Act, 1776, and the Parsonages Act, 1838, money is borrowed by an incumbent upon the security of a mortgage of the revenues of his benefice, it is essential to the validity of the mortgage—(1.) that the money should be borrowed prospectively for the purpose of paying for future works to be executed, and not for the purpose of repaying money already expended; and (2.) that the money should be paid into the hands of a nominee as required by s. 4 of the Act of 1776.

The incumbent of a living, finding that the vicarage house was too small for his requirements, sold it with the consent of the ordinary and patron, and the purchase-money was duly paid to the Governors of Queen Anne's Bounty. He subsequently found a house more suitable for the purpose, and the purchase of it was approved by the Governors of Queen Anne's Bounty and by the ordinary and patron. The money in the hands of Queen Anne's Bounty being insufficient to provide the purchase-money, it was arranged that the incumbent should find the balance. This he accordingly did by means of a personal loan from members of his own family, and sent a cheque for the balance to Queen Anne's Bounty, and shortly afterwards the purchase was completed. About a year after its completion the incumbent obtained from the ordinary his approval and consent to a mortgage of the revenues of the benefice in favour of the lenders, and that approval and consent were expressed in a memorandum of approval duly executed by the ordinary. A few days later a mortgage in the form scheduled to the Act of 1776, adapted to the case of a purchase, was executed by the incumbent. It purported to charge the whole revenues of the benefice with the repayment to the lenders of the money advanced by annual instalments of principal and interest as provided by the Acts. The incumbent subsequently exchanged his benefice for another, and, the new incumbent finding the vicarage house too large, it was sold and a new vicarage house bought with a part of the proceeds of sale and the balance paid into the hands of the Governors of Queen Anne's Bounty:—

Held, that the mortgage having been executed to secure the repayment of money already expended, and the money not having been paid into the hands of a nominee as required by s. 4 of the Act

of 1776, the mortgage was not in accordance with the Acts, and was, therefore, invalid.

Held, also, that the mortgagees had no lien on the new vicarage or on the balance in the hands of the Governors of Queen Anne's Bounty.

ACTION.

In and prior to January, 1896, the Rev. Samuel Lidbetter was vicar of St. Paul's, Southampton. The vicarage house was then No. 3, Carlton Crescent, Southampton. That house, being considered unsuitable for the vicarage house, was, with the consent of the Bishop of Winchester, who was both the ordinary and patron of the living, sold, and the sum of 615*l.*, representing the purchase-money, was, in pursuance of s. 8 of the Parsonages Act, 1838 (1 & 2 Vict. c. 23), duly paid to and received by the Governors of Queen Anne's Bounty, and in March, 1896, the house was conveyed to the purchaser.

In July, 1896, Mr. Lidbetter found another house, No. 11, Carlton Crescent, which he thought would be more suitable than the old vicarage house, and in that month the purchase of that house for 1500*l.* was approved by the Governors of Queen Anne's Bounty and by the bishop, and all the necessary steps were taken to make the purchase of that house a lawful one. Towards the purchase-money of that house Queen Anne's Bounty had only 615*l.* in hand, and a further small sum which had been paid in respect of dilapidations by a previous incumbent. These moneys being quite insufficient to provide the purchase-money, it was arranged that the balance of it should be provided by Mr. Lidbetter, who in fact provided it by means of a loan from some of his relatives, who, with the exception of one who had since died, were the plaintiffs in the present action. The moneys so borrowed were not paid into the hands of a nominee as required by s. 4 of the Clergy Residences Repair Act, 1776 (17 Geo. 3, c. 53), when the subsequent mortgage of the revenues of a benefice is in contemplation.

It appeared from the evidence that a misunderstanding had arisen between Mr. Lidbetter and the Governors of Queen Anne's Bounty as to the balance of purchase-money being secured by a charge on the revenues of the benefice, but the Court was satisfied that the Governors assumed that it would not be so secured, and

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that Mr. Lidbetter thought that it would be so secured and that he would thereby be relieved of his personal liability to the persons who had lent the money.

The purchase having been approved by Queen Anne's Bounty and the bishop as ordinary and patron, Mr. Lidbetter sent to the Bounty a cheque for the 875*l.* towards the balance of the purchase-money, and on September 29, 1896, the conveyance was duly executed, the purchase-money being 1500*l.*, and the purchase was duly completed. The conveyance was subsequently registered in the Winchester diocesan registry.

A few months later Mr. Lidbetter realized that so far he had no charge on the living, and accordingly he and the bishop and the bishop's advisers set themselves to work to find out some means by which what they regarded, and in the opinion of the Court rightly regarded, as a result of a misunderstanding might be remedied and a legal charge effectually created.

In August, 1897, or nearly a year after the purchase had been completed, Mr. Lidbetter applied for and obtained from the bishop his consent to and approval of a mortgage of the profits and emoluments of the benefice to secure the loan of 875*l.* and an additional sum of 91*l.* expended by him with the approval of the Governors of Queen Anne's Bounty on repairs to the new vicarage house; and this approval and consent were expressed in a memorandum of approval dated August 20, 1897, and duly executed by the bishop.

On August 25, 1897, a mortgage in the form scheduled to the Act of 1776 (adapted to the case of a purchase) was executed by Mr. Lidbetter as incumbent of the benefice, and purported to charge the whole income of the benefice in the hands of the incumbent with the repayment of the above sums by annual instalments of principal and interest in accordance with the Acts of 1776 and 1838. On August 31, 1897, this mortgage was deposited in the Winchester diocesan registry as required by the Act of 1776.

In 1904 Mr. Lidbetter exchanged his living of St. Paul's, Southampton, with the Rev. James Edgar Hatch for the living of Lois Weedon, Northamptonshire.

In 1905 No. 11, Carlton Crescent, being found too large a house

for the vicarage, was sold for 1900*l.*, or 400*l.* more than the price paid for it in 1896, and a new vicarage house was bought with a portion of the proceeds, and there was now a balance of about 400*l.* in the hands of the Governors of Queen Anne's Bounty representing the unspent balance.

The first instalment of principal and interest due under the mortgage on August 1, 1904, was duly paid by Mr. Hatch, but when the second instalment became due Mr. Hatch refused to make any further payment on the ground that the mortgage had not been executed in the circumstances contemplated and in the manner directed by the Acts, and therefore created no valid charge upon the profits and emoluments of the benefice.

In these circumstances the mortgagees commenced the present action against Mr. Hatch and the Governors of Queen Anne's Bounty, claiming a declaration that the mortgage of August 25, 1897, constituted a valid charge on all the premises comprised therein and relief consequential on such declaration, or, in the alternative, if by virtue of the Acts not having been complied with the mortgage was not a valid mortgage, a declaration that they were entitled to a lien on the new vicarage house which had been purchased with the proceeds of the sale of No. 11, Carlton Crescent, and on the balance of the proceeds in the hands of the Governors of Queen Anne's Bounty.

Rowden, K.C., and *Charles Bathurst*, for the plaintiffs. We say that the mortgage of August 25, 1897, is valid for the following reasons: (1.) It was made to secure the repayment of money borrowed by the incumbent for the purchase of a vicarage house, and is therefore within the scope of the Clergy Residences Repair Act, 1776, and the Parsonages Act, 1838; (2.) it does not contravene any express provision of the Acts either as to time, order of proceedings, or otherwise; (3.) it follows the form in the schedule to the Act of 1776; (4.) the formalities required by the Act of 1776 are directory and not imperative; and (5.) it had the approval and consent of the bishop patron and incumbent, for the purpose of obtaining which such formalities are prescribed.

Sect. 1 of the Act of 1776 enables an incumbent of any

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ecclesiastical benefice whereon there is no proper house, with the consent of the ordinary and patron, to borrow money to build one and to mortgage the glebe, &c. Sect. 4 provides that the money so borrowed is to be paid to a nominee to be appointed by the ordinary, patron and incumbent. That provision is, it is submitted, directory and not imperative. The nominee is required only where the money is to be applied in the payment for repairs and rebuilding. Here the money was paid to Queen Anne's Bounty. Sect. 10 authorizes the purchase of a new building for the residence of the incumbent. The money in the present case was therefore borrowed under the powers of the Act. Sect. 12 empowers Queen Anne's Bounty to lend the necessary money. Here application was made to Queen Anne's Bounty for a loan, but it was refused. This left the incumbent at liberty to borrow the money, and it has been held that he may advance his own money and charge the living with the money so advanced: *Boyd* v. *Barker*. (1)

The mortgage follows the form in the schedule to the Act of 1776, with only such variations as are necessitated to adapt it to the case of a purchase.

[WARRINGTON J. The form is clearly applicable to the case of a purchase.]

The words "borrow and take up at interest for the purposes of the said Acts" in s. 1 of the Act of 1838 include the case of a purchase contemplated by s. 10 of the Act of 1776. Although the mortgage was not executed until August 25, 1897, it is submitted that the money thereby secured was borrowed for the purpose of the purchase of the house. It was undoubtedly borrowed before the conveyance of it was executed.

Further, the insertion of a nominee in the mortgage deed is not an indispensable condition where the money is borrowed for the purpose of a purchase. It is only necessary where there are buildings or repairs to be executed.

[WARRINGTON J. The point put against you is that money borrowed under these Acts must always be paid into the hands of a nominee, and must not be dealt with by the parties themselves.]

Finally, we rely upon the bishop's approval and consent

(1) (1859) 4 Drew. 582.

embodied in the document of August 20, 1897, annexed to the mortgage.

[WARRINGTON J. That document is wholly inapplicable to the case of a purchase. Under s. 10 of the Act of 1776 the contract must be made either by the ordinary patron and incumbent or by a nominee appointed by them and the contract approved by them.]

The ordinary has to approve, not only the borrowing, but the security to be given.

If, however, the Court is of opinion that the mortgage is invalid, it is submitted in the alternative that the mortgagees are entitled to a lien on the new vicarage house which has been purchased with their money and on the balance of the purchase-money in the hands of Queen Anne's Bounty.

George Lawrence, for the defendants, the Governors of Queen Anne's Bounty. The balance of the purchase-money in the hands of the Governors of Queen Anne's Bounty is held by them for the purposes mentioned in s. 14 of the Church Building Act, 1839 (2 & 3 Vict. c. 49). It would be an extraordinary thing if the incumbent here, by failing to comply with the requirements of the Acts and thereby precluding himself from obtaining a valid mortgage on the revenues of the benefice, should nevertheless be entitled to a lien on the house purchased and the money in the hands of the Governors. In the circumstances, however, if the Court is of opinion that the money in the hands of the Governors may legally be applied by them in assisting Mr. Lidbetter, they will be prepared to consider the propriety of their so doing.

Norton, K.C., and *C. Church*, for the defendant Hatch. The whole scheme of the Acts is to enable money to be borrowed for the purpose of paying for something to be done, and not of paying for something which has already been done. There is a great difference between borrowing money for a future purchase and borrowing money for the purpose of repaying money which has already been expended. That may be illustrated by the case of the Settled Land Acts, where it was found necessary to pass an amending Act in order to enable the Court to sanction the application of capital money in payment of improvements already executed: Settled Land Act, 1890, s. 15.

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Further, it is essential that the procedure prescribed by the Acts should be strictly followed, and that has not been done.

[They were stopped.]

WARRINGTON J. The plaintiffs in this case claim to be mortgagees of the revenues of the benefice of St. Paul's, Southampton, by virtue of a mortgage dated August 25, 1897, which purports to have been made by virtue and under the authority of the Clergy Residences Repair Act, 1776 (17 Geo. 3, c. 53), and the Parsonages Act, 1838 (1 & 2 Vict. c. 23). The question which I have to determine is whether or not that mortgage effects a valid charge upon the revenues of the living. That question, of course, depends on the solution of the further question—namely, whether or not that mortgage is executed in accordance with the requirements of the two Acts.

Now, before I state the facts, I think it will be convenient that I should first refer to the Acts under the authority of which the mortgage is said to have been made. The first of these is the Act of 1776, which is entitled "An Act to promote the residence of the parochial clergy, by making provision for the more speedy and effectual building, rebuilding, repairing or purchasing houses, and other necessary buildings and tenements, for the use of their benefices." Sect. 1, after a recital which I need not read as I have read the title of the Act, provides that from and after the date named, "whenever the parson, vicar or other incumbent of any ecclesiastical living, parochial benefice, chapelry or perpetual curacy, being under the jurisdiction of the bishop or other ecclesiastical ordinary, whereon there is no house of habitation, or such house is become so ruinous and decayed or is so mean, that one year's neat income and produce of such living will not be sufficient to build, rebuild, or put the same, with the necessary offices belonging thereto, in sufficient repair, shall think fit to apply for the aid and assistance intended to be given by this Act, it shall and may be lawful" (reading it shortly) for the parson, vicar or incumbent (after having procured a certificate shewing the condition of the buildings, the value of the timber and materials on the glebe fit to be employed, and an estimate of the work proposed to be done, and laid the same, with an

account in writing, signed by him, and verified upon oath of the annual profits of the living before the ordinary and patron, and obtained their consent to such proposed new buildings or repairs, by writing under their hands, in the form contained in the schedule to the Act) to borrow and take up at interest, in the manner thereinafter mentioned, such sum of money as the estimate shall amount unto, after deducting the value of timber or other materials, not exceeding two years' net income of the living, and, as a security for the money so to be borrowed, to mortgage the glebe, tithes, rents, and other profits and emoluments of the living for the term of twenty-five years, or until the money so to be borrowed, with interest and costs and charges and expenses, shall be fully paid, the mortgage deed to be made in the form or to the effect contained in the schedule, and to bind every succeeding parson, vicar or incumbent, until the principal and interest, costs and charges, shall be paid off, as fully as if the successor had executed the same. It will be observed that that section in terms makes no reference to the case of the purchase of houses which appears to have been contemplated by the preamble of the Act, but refers only to the erection or repair of buildings. But in reference to money required for buildings and repairs it states what is to be done in order that a parson may be entitled to borrow, and points out the mode in which the money so borrowed is to be secured. Then s. 4, which is most important, provides that "the money so to be borrowed shall be paid into the hands of such person or persons as shall be nominated and appointed to receive and apply the same for the purposes aforesaid, by the ordinary, patron, and incumbent, by writing under their respective hands, in the form for that purpose contained in the said schedule, after such nominee shall have given a bond to the ordinary, with sufficient surety, in double the sum so to be borrowed or raised, with condition for his duly applying and accounting for the same according to the directions of this Act"—in other words, the money to be borrowed is not to be paid to the incumbent or patron or ordinary, but to a nominee, and is to be so paid to him before any application of it; then, reading the section shortly, it provides that the nominee is to enter into contracts for the buildings or repairs,

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and is to inspect and have the care of the execution of the contracts, and is to pay the money for the buildings and repairs according to the terms of the agreements, and when the buildings or repairs are completed he is to make out an account of his receipts and payments and enter them in a book to be laid before the ordinary, patron and incumbent, and then when his accounts are allowed he is to get his discharge, any balance in his hands to be laid out in some further lasting improvements in building upon the glebe, or to be applied in discharge of part of the principal money borrowed.

It is clear from those sections that the money required is to be borrowed prospectively for the purpose of paying for future works to be executed. So far the Act has provided nothing as to the purchase of buildings. That is dealt with in s. 10, which provides that, so far as new buildings are required for the residence of the incumbent, "pursuant to the authority hereby given, it shall and may be lawful for the ordinary, patron, and incumbent, of every such living or benefice, to contract, or to authorise, if they shall think fit, the person so to be nominated by them as aforesaid to contract, for the absolute purchase of any house or buildings, in a situation convenient for the habitation and residence of the rector or vicar of such living or benefice," and "to cause the purchase-money for such house or buildings to be paid out of the money to arise under the powers and authorities of this Act," but "no contract so made by the nominee shall be valid, until confirmed by the ordinary, patron, and incumbent, by writing under their hands; and every such purchase-deed shall be in the form or to the effect contained in the schedule hereunto annexed." That section is a more difficult one to understand, for this reason: that it does not in terms provide that the incumbent may borrow money for the purpose of purchasing a residence; but it enacts that the ordinary, patron and incumbent may contract to purchase, and that the purchase-money is to be paid out of the money to arise under the Act, as if under the assumption that the money had been raised under the provisions of s. 1, and that enough money remained for the purchase-money for the new residence to be paid out of it. I think the real meaning of the Act is, having

regard to s. 10, that the incumbent is authorized to borrow the money for the purposes mentioned in s. 1; and the money so borrowed is to be paid into the hands of a nominee under s. 4, and the "money to arise under the powers and authorities of this Act" (in s. 10) is the money in the hands of the nominee—in other words, the effect of s. 10 is to add the payment of purchase-money of the new residence to the several modes of application of the money arising under the Act already enumerated in s. 4. But before the purchase of a residence under s. 10 can come into operation, it is necessary to find that there is in existence money arising under the powers and authorities of the Act. It appears to me that it was essential in the minds of the framers of the Act that there should be a nominee, who should be responsible for the application of the money to arise under the Act, and that the money should be raised in contemplation of something to be done, whether erection of buildings, repairs or purchase, and not for the payment of money already expended.

The provisions of that Act were to some extent enlarged by the Parsonages Act, 1838, which is entitled "An Act to amend the law for providing fit houses for the beneficed clergy." Sect. 1 provides that "It shall be lawful for the incumbent of any benefice to borrow and take up at interest for the purposes of the said Acts," that is, the Act of 1776 and an amending Act, "and also for the purpose of buying or procuring, if necessary, a proper site for a house and other necessary buildings, or for the purposes of the said Acts only." The purposes of the former Acts included the purchase of a house, but did not include the purchase of a site for a house, so this new provision was necessary—"any sum or sums of money not exceeding three years' net income of such benefice, and to take all such proceedings as are required," and, as a security for the money so to be borrowed, to mortgage the glebe, tithe, rent-charges, and other profits and emoluments of the benefice, for a term of thirty-five years—instead of twenty-five years—or until the money so to be borrowed, with interest, and costs and charges, shall be paid; from and after the expiration of the first year of the term (in which year no part of the principal sum

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shall be repayable) the incumbent to pay every year to the mortgagee one-thirtieth part of the principal, and the mortgage deed to be made as nearly as may be in the form or to the effect of the form contained in the schedule to the Acts, and to bind every succeeding incumbent as if he had made and executed the same. Then s. 13 provides that, "All powers, authorities, provisions, forms, and matters in the said Acts contained shall, except as is herein otherwise directed, extend and be applicable, mutatis mutandis, to all mortgages and other instruments made, as well under and for the purposes of this Act as of the beforementioned Acts, and as if the same had been respectively repeated and set forth herein."

Those, then, are the material provisions of the Acts. [His Lordship then stated the facts, and, dealing with the mortgage of August 25, 1897, said:—] I have already read s. 1 of the Act of 1776, which provides that certain documents shall be laid before the ordinary and patron and that they shall give their consent to the proposed new building or repairs, and I have also read s. 4, which provides for the appointment of a nominee who is to receive the money and to see that the work is done. Now the Act contained a form of consent, to the effect that the rector, or vicar, under the jurisdiction of the ordinary, having produced to the ordinary and patron a certificate, plan and estimate and an account of the income, the ordinary and patron, having considered the certificate, plan and account, "do approve thereof; and do consent, that such buildings and repairs shall be made as therein specified; and that the" incumbent "do borrow and take up at interest the sum of ——, being the estimate of the expences, ... which money is to be paid to —— (a person nominated by us and the said (incumbent)), and applied according to the direction of the said Act." That is in substance the form in the schedule. The bishop and his advisers and Mr. Lidbetter were met with this difficulty, that they had not appointed a nominee, and further they had to adapt that form to make it applicable to a case of a purchase in which there was no nominee, the money in this case having been paid to Mr. Aston as the secretary and treasurer of Queen Anne's Bounty. Accordingly on August 20, 1897, nearly a year after the purchase had been completed, the

bishop executed a form of consent in these terms: "Whereas a sum of 625*l.* or thereabouts was available in the hands of the Governors of Queen Anne's Bounty for the purchase of a residence house for the benefice of St. Paul, Southampton, arising mainly from the sale of the old vicarage house and" (after reciting that under the Clergy Residences Repair Act, 1776, the Parsonages Act, 1838, the Parsonages Act, 1865, and the Ecclesiastical Dilapidations Act, 1871, it was lawful for the incumbent to borrow and take up at interest for the purposes of the Acts any sum or sums of money not exceeding three years' income and to mortgage the emoluments for the purposes and in the manner authorized by the Acts) "whereas we Randall Bishop of Winchester as ordinary and patron are satisfied of the propriety of the sale of the old residence house of the said benefice of St. Paul, Southampton, and of the investment of the proceeds of such sale in the purchase of No. 11, Carlton Crescent, Southampton, for a new residence house for the said benefice at or for the price of 1500*l.*, and of the expenditure of a further sum of 91*l.* 12*s.* 4*d.* for repairs to the roof of the said house, and that a sum of money might properly be raised by mortgage under the aforesaid Acts to meet the balance of the said purchase-money the sum of 91*l.* 12*s.* 4*d.* and other costs and expenses incurred for or in relation thereto this mortgage and" (after reciting—and here they were trying to follow the form as far as they could—that Mr. Lidbetter had produced an account of the annual profits of his living and of the outgoings verified upon oath) "whereas we have considered such account and the desirability of acquiring the said house 11, Carlton Crescent, Southampton, as and for a residence house for the said benefice and are of opinion that the required balance of purchase-money and expenses as aforesaid may and ought to be properly raised and charged upon the said benefice by a mortgage such as is authorized by the said Acts"—and then, in order to state the facts truly, it was necessary to depart from the form, the document proceeds thus: "And whereas such balance has been advanced to the said Samuel Lidbetter by Fanny the wife of the said Samuel Lidbetter, Arthur Lidbetter and Edith Mabel Lidbetter out of moneys belonging to them on a joint account and 875*l.*

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part thereof has been paid to the treasurer of Queen Anne's Bounty and expended by him in part payment of the purchase-money of the said house Now we do hereby as ordinary and patron approve and consent that the balance of purchase-money and expenses with interest thereon shall be secured to the aforesaid persons by a mortgage to be executed by the said Samuel Lidbetter in pursuance of the said Acts."

It is said by the plaintiffs that this document only departs from the form in the schedule in immaterial particulars. I admit that that is so so far as regards the necessity of adapting the form prescribed by the Act, which was applicable to buildings and repairs, to the case of a purchase of a vicarage house, but I do think it departed from the statutory form in a material respect so far as regarded the nominee. The form states that the money to be borrowed must be paid to the nominee to be applied by him. This document states that the money borrowed has been paid to Mr. Aston, who was not a nominee, and has been applied by him. In that respect it seems to me that it departs substantially from the form. Then the other document which was executed was a mortgage to the plaintiffs which is dated August 25, 1897. Again, the form of mortgage in the schedule is one which is applicable to the case of buildings and repairs of buildings, and so would require adaptation to make it applicable to the case of a purchase. The form (reading it shortly) is that "whereas the" parson "hath obtained the consent . . . . to borrow and take up at interest the sum" to be expended and whereas the mortgagee "hath agreed to lend and advance the sum" it is witnessed that the mortgagor, "in consideration . . . . of the sum of ——*l.* paid at or before the sealing and delivery hereof into the hands of —— (a person or persons (as the case may be) nominated by the said ordinary, patron and incumbent to receive the same pursuant to the direction of the said Act . . . .) doth grant," and so on, the parson mortgaging the emoluments of the living. Here again the statutory form had to be modified in order to fit the facts of the particular case. The mortgage deed of August 25 accordingly proceeds: "Whereas the said Samuel Lidbetter pursuant to the directions of the Clergy Residences Repair Act, 1776, the Parsonages Act, 1838, the Parsonages Act, 1865, and the

Ecclesiastical Dilapidations Act, 1871, having obtained the consent of the Bishop of Winchester, as the ordinary of the said diocese, and as the patron of the said vicarage, to borrow and take up at interest the sum of 994*l.* to be laid out and expended in or towards the purchase of a new house for the said vicarage and the costs and expenses of and incidental to the preparation of the mortgage deed" and the mortgagees had agreed to lend the sum of 994*l.* upon a mortgage of the emoluments. "Now this indenture witnesseth that the said Samuel Lidbetter in the consideration of the said sum of 875*l.* out of moneys belonging to the mortgagees on a joint account at or before the sealing or delivery hereof into the hands of Joseph Keech Aston," that is, the secretary of Queen Anne's Bounty—" of No. 3, Dean's Yard, in the City of Westminster, gentleman (as appears by his letter of the 18th June, 1895, as one part hereof annexed) to be (and the same has been) by him disbursed pursuant to the directions of the said Acts to make up the balance of a sum of 1500*l.* which was required for the purchase of a residence house for the said benefice and a further sum of 119*l.* paid by the mortgagees as aforesaid to and disbursed by the said Samuel Lidbetter for the legal and surveyor's costs charges and expenses of the said purchase and of this mortgage and for repairs to the roof of the said residence Hath granted bargained sold and demised and by these presents doth bargain sell and demise"; and then follows the rest of the mortgage in accordance with the form.

The plaintiffs in these circumstances claim to be mortgagees of the emoluments of the living. If, by reason of the requirements of the Acts, they are not that, yet they claim to have a lien on the new house and on the balance of the proceeds of sale of the old house in the hands of Queen Anne's Bounty. They argue that Mr. Lidbetter, being in the position of a limited owner who has expended his own money in the improvement of the property, must be entitled to a lien on the property which has been so improved. If that were so, it seems to me that, not merely in this but in every case, an incumbent could buy a house without complying with the requirements of the Acts and obtain a lien on the house, although he would not have a mortgage upon the revenues of the benefice. It seems to me

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that is quite a hopeless position to maintain. As to the balance in the hands of the Governors of Queen Anne's Bounty arising from the fact that the new house did not cost so much as the old one, the Governors, under the provisions of s. 9 of the Act of 1838, are bound to hold that for the benefit of the benefice, but, realizing that a blunder has been made which they think may properly be put right if possible, say that they might be willing to consider whether that money could in some way be applied to relieve Mr. Lidbetter from the difficulty in which he has been placed, if I could say that it could be properly so applied; but I confess I do not see my way to do so. The Act is explicit that it shall be applied for the benefit of the benefice.

It remains, therefore, to consider the plaintiffs' first claim, namely, that the mortgage is a valid mortgage in pursuance of the Act of 1776. I have already indicated the objection to it which is taken on the part of the present incumbent, namely, first, that the Act contemplates a borrowing for the purpose of a prospective application, and not the giving of a security for money which has already been lent and applied. It is said, and in fact it is admitted, that the incumbent himself may be the mortgagee under the Act. If he is the person who finds the money, and if the proper steps are taken as required by the Act, the mortgage may be to himself. But that does not dispose of the difficulty. I think it is clear on the face of the Act that it was not intended to provide for giving security for money advanced for the purpose of purchasing a residence without taking the necessary steps. There is all the difference in the world between obtaining an advance with the necessary sanctions for the purpose of future application, and obtaining a security for money which has already been applied without going through those necessary steps. I think that is illustrated in the most forcible way in this case. If I am right—and I think there is no question about it on the correspondence—the Governors of Queen Anne's Bounty thought that the balance of the purchase-money was going to be found by the vicar himself, and was not to be a charge on the living; and I think the secretary is right in stating what he conceives to be their practice, and which is what one would reasonably suppose to be their practice, namely, that it is a material

consideration in their minds, in considering whether moneys in their hands shall be applied in purchase, whether the balance is to be found by the incumbent himself or is to be a charge on the living. That shews at once how important it is that, at the time the purchase is made, the sources from which the money is coming should be made perfectly clear, namely, whether it is to be a charge under the Act, or whether it is to come from other sources and not to be a charge under the Act.

It seems to me, therefore, that it is essential, in order that the Act may have its operation, that the money should be borrowed prospectively for the purpose of being applied in the manner provided for by the Act. That really deals with the whole of the case, because the fact that the Act requires the appointment of a nominee is merely an element in arriving at the conclusion that it does contemplate that prospective borrowing. But, whether that is so or not, it seems to me quite plain on the face of the Act that the appointment of a nominee was essential. There was to be a third person. One should remember that the money is to be borrowed by the incumbent, and the Act, I think deliberately, provided that the borrower should not be the person to apply the money when borrowed, but that there should be a third person who was to be appointed by the patron and ordinary and the incumbent, and that he was to be the person who should apply the money, and no money is applicable for the purpose of either repairs or purchase until the nominee has been appointed and the money has gone into his hands.

That disposes of the case. It is said that it is a very hard case on the plaintiffs and Mr. Lidbetter. I think probably it is, but I think also that it may be a very hard case, and frequently is a very hard case, on a succeeding incumbent to find that the revenues of the living are saddled with a charge incurred or created by a previous incumbent who possibly required more accommodation than the succeeding one did. That being so, I think it is of the utmost importance that, when such a charge is thrown upon the living, all the requirements of the Act should be most strictly complied with. They have not been complied with in this case, and I think I must hold that the mortgage is invalid. The result will be that the action must be dismissed.

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There will be a declaration that the mortgage of August 25, 1897, is not a valid mortgage, and the incumbrancer is not liable to pay under it; that nothing can be recovered from Mr. Hatch; and that there is no lien on the proceeds of sale.

Solicitors: *Ward, Bowie & Co.; Lovell, Son & Pitfield, for Paris, Smith & Randall, Southampton; F. G. Hughes.*

W. I. C.

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CLIFFORD *v.* TIMMS.

[1906 C. 2818.]

Partnership—Articles—Construction—"Professional Misconduct"—Dentist—Evidence—General Council of Medical Education and Registration—Order of, erasing Name from Dentists' Register—Report of Dental Committee—Admissibility—Dentists Act, 1878 (41 & 42 *Vict. c.* 33), *ss.* 13, 14, 15.

Articles of partnership between the plaintiff and the defendant, who were dentists, provided that if either partner should at any time during the continuance of the partnership be guilty of "professional misconduct," or of any act which was calculated to bring discredit upon or injure the other partner or the partnership business, the other partner should be at liberty to give notice in writing of his intention to determine the partnership.

The defendant gave the plaintiff notice of his intention to determine the partnership on the ground that the plaintiff had been guilty of "professional misconduct." The plaintiff thereupon brought an action claiming a declaration that the notice was invalid and that the partnership was still subsisting, and an injunction to restrain the defendant from acting upon the notice. The defendant in justification of the notice tendered in evidence an order of the General Medical Council, acting under the Dentists Act, 1878, directing the registrar to erase the name of the plaintiff from the Dentists' Register upon the ground that it had been proved that he had been guilty of conduct which was "infamous or disgraceful in a professional respect" within s. 13 of the Act, and also the report of the Dental Committee upon which that order was based:—

Held, that neither the order nor the report was admissible in evidence upon the issue whether the plaintiff had been guilty of "professional misconduct" within the meaning of the articles.

Held, also, on the facts, that the plaintiff had not been guilty of "professional misconduct" within the meaning of the articles.

ACTION.

The plaintiff and the defendant were partners in the business

of dentists. The articles of partnership, which were dated October 2, 1899, contained a provision (clause 23) which, so far as it is material, was in these terms: "If either partner shall at any time during the continuance of the partnership be guilty of professional misconduct or of any act which is calculated to bring discredit upon or injure the other partner or the partnership business, the other partner shall be at liberty to give notice in writing of his intention to determine the partnership, and thereupon the partnership shall be dissolved and wound up under the provisions of these presents in the same manner as if the offending partner had died on the day of the date of such notice."

On June 28, 1906, the defendant gave to the plaintiff a notice in writing in these terms: "Whereas you have been guilty of professional misconduct within the meaning of clause 23 of the deed of partnership entered into between us and dated October 2, 1899, I hereby give you notice of my intention to determine the partnership created by the said deed."

Some discussion and negotiations between the parties took place in consequence of that notice, but the negotiations fell through, and ultimately on August 20, 1906, the defendant gave to the plaintiff another notice in the same terms as that of June 28.

This was an action by the plaintiff claiming—(1.) a declaration that the partnership between the plaintiff and the defendant created by the deed of October 2, 1899, had not been determined by the notice of June 28, 1906, or by the notice of August 20, 1906, but was still subsisting and undetermined; (2.) a declaration that the notice of August 20, 1906, was void and of no effect; and (3.) an injunction to restrain the defendant from acting on the said notices or either of them or alleging that the partnership had been determined.

The defendant alleged that the plaintiff had in fact been guilty of "professional misconduct" within the meaning of the articles of partnership. This the plaintiff denied, and insisted that the notices were ineffectual and that the partnership was subsisting. The question, therefore, to be determined was whether the plaintiff had, or had not, been guilty of "professional misconduct" within the meaning of the articles.

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The facts proved or admitted were as follows: In the year 1887 a company was incorporated under the Companies Acts under the name of the American Dental Institute, Limited. The plaintiff was at all material times one of the principal shareholders in, and a director of, this company. The company carried on a dental practice at various places in London and elsewhere. The company to the plaintiff's knowledge employed certain unregistered persons to attend patients and perform dental operations upon them. Some of these persons were proved to have on one or two occasions used the title of "doctor." The company to the plaintiff's knowledge advertised by certain pamphlets.

At the trial counsel for the defendant tendered in evidence of the alleged "professional misconduct" of the plaintiff an order dated May 24, 1906, of the General Medical Council, acting under the powers of the Dentists Act, 1878, directing the registrar to erase from the Dentists' Register the name of the plaintiff upon the ground that it had been proved that he had been guilty of conduct which was "infamous or disgraceful in a professional respect" within s. 13 of the Act, and a report dated May 19, 1906, of the Dental Committee upon which such order was based. The admission of both these documents was objected to by counsel for the plaintiff, but the objection to the admission of the order was overruled by Warrington J., and the report was, by arrangement, admitted de bene esse. In his subsequent judgment his Lordship held that neither the order nor the report was admissible on the issue which he had to try. The arguments as to the value and effect of those documents on the assumption that they were admissible in evidence are therefore omitted.

H. Terrell, K.C., *A. Houston*, and *R. J. Drake*, for the plaintiff. The only issue before the Court is whether the plaintiff has been guilty of "professional misconduct" within the meaning of the partnership articles so as to justify the defendant in giving the notice to determine the partnership. Upon that issue neither the order of the General Medical Council nor the report of the committee upon which it was founded, being res inter alios acta,

is admissible in evidence: *Yates* v. *Kyffin-Taylor* (1); *Leyman* v. *Latimer* (2); *March* v. *March* (3); *Castrique* v. *Imrie*. (4)

Norton, K.C., and *E. F. Buckley*, for the defendant. The order of the General Medical Council was a judgment in rem against the plaintiff on a matter which affected his status as a dentist. The effect of the erasure of his name from the Dentists' Register was to prevent him from recovering fees: Dentists' Act, 1878, s. 5. It is therefore admissible in evidence: *Harvey* v. *Rex*. (5) The report is admissible in evidence as forming part of the order and enabling it to be understood.

H. Terrell, K.C., in reply. The question as to what constitutes "professional misconduct" is for the Court to decide upon the construction of the partnerhip articles. "Professional misconduct" there means conduct which is calculated to injure the practice. The order of the General Medical Council is nothing more than the opinion of the six persons composing it that what the plaintiff has done is "professional misconduct." It is submitted that what the plaintiff is charged with is not misconduct in any sense, but that if it is, it is not "professional misconduct" within the meaning of the articles of partnership.

Cur. adv. vult.

Jan. 26. WARRINGTON J. stated the facts as above set forth, and continued:—The main foundation on which the defendant rests his claim to be entitled to give the notices of June 28 and August 20 is the fact that on May 24, 1906, the General Medical Council, acting under the powers conferred upon them by the Dentists Act, 1878, made an order directing the registrar to erase from the Dentists' Register the name of the plaintiff and certain other persons on the ground that it had been proved that they had been guilty of conduct which was "infamous or disgraceful in a professional respect."

The provisions of the Dentists Act, 1878, so far as they are material for the purposes of the present action, are as follows: Sect. 2, which is the interpretation section, provides that "In

(1) [1899] W. N. 141.
(2) (1878) 3 Ex. D. 352, 354.
(3) (1858) 28 L. J. (P. & M.) 30.
(4) (1870) L. R. 4 H. L. 414.
(5) [1901] A. C. 601.

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this Act 'General Council' means the General Council of Medical Education and Registration of the United Kingdom, established under the Medical Act, 1858; and 'branch council' means a branch of the said council as constituted by the same Act." Sect. 3 imposes penalties on unregistered persons using the title of "dentist" or "dental practitioner," or similar titles, and contains provisions relieving certain persons from prosecution for such offences. Sect. 5 provides that "A person registered under this Act shall be entitled to practise dentistry and dental surgery in any part of Her Majesty's dominions, and from and after the 1st day of August, 1879, a person shall not be entitled to recover any fee or charge, in any Court, for the performance of any dental operation or for any dental attendance or advice, unless he is registered under this Act or is a legally qualified medical practitioner." The Act then provides for the qualifications necessary for registration, and it contains a number of provisions in reference to the register, and then come ss. 13, 14 and 15, which are the most important for this case. Sect. 13: "The General Council shall cause to be erased from the Dentists' Register any entry which has been incorrectly or fraudulently made. Where a person registered in the Dentists' Register has, either before or after the passing of this Act, and either before or after he is so registered, been convicted either in Her Majesty's dominions or elsewhere of an offence which, if committed in England, would be a felony or misdemeanor, or"—and these are the important words—"been guilty of any infamous or disgraceful conduct in a professional respect, that person shall be liable to have his name erased from the register. The General Council may, and upon the application of any of the medical authorities shall, cause inquiry to be made into the case of a person alleged to be liable to have his name erased under this section, and, on proof of such conviction or of such infamous or disgraceful conduct, shall cause the name of such person to be erased from the register"; and then there follows a proviso which I need not read. Sect. 14 provides that "Where the General Council direct the erasure from the Dentists' Register of the name of any person, or of any other entry, the name of that person, or that entry shall not be again entered in the register,

except by direction of the General Council, or by order of a Court of competent jurisdiction." Sect. 15 provides that "The General Council shall for the purpose of exercising in any case the powers of erasing from and of restoring to the Dentists' Register the name of a person or an entry, ascertain the facts of such case by a committee of their own body, not exceeding five in number, of whom the quorum shall be not less than three, and the report of the committee shall be conclusive as to the facts for the purpose of the exercise of the said powers by the General Council"; and then there are provisions as to the mode in which the committee shall carry on these investigations, but those I think I need not read. I will only for the present remark that under the Act it is the council who have to find that the person charged has been guilty of the conduct referred to in the Act, the committee, on whose report the council are to act, only ascertain the facts on which the council exercise their judgment.

The order of May 24 contained a statement that on the facts found by the committee it had been proved that the plaintiff had been guilty of conduct which was "infamous or disgraceful in a professional respect." The defendant tendered in evidence the order of May 24 and the report dated May 19 of the committee, and further insisted that they were together conclusive evidence that the plaintiff had been guilty of conduct infamous or disgraceful in a professional respect, and that, this being so, I must hold that he had been guilty of professional misconduct within the meaning of the articles. Objection was taken to the admissibility of both these documents. I admitted the order on a ground which on consideration, and having regard to what I now hold to be the real issue to be tried, I do not think sufficient. The report of the committee was by arrangement put in de bene esse, and the question as to the admissibility and effect, if admissible, of both these documents is I think open. The question as to the admissibility and the effect, if admissible, of both these documents must, in my opinion, be determined by considering the issue which I have to try. That issue is not whether the plaintiff's name has been removed from the register. If it were, the order would, I think, be admissible and conclusive as a judgment in rem. The issue is not, in my opinion, whether the

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plaintiff has been guilty of conduct which is "infamous or disgraceful in a professional respect." It seems to me that the expression with which I have to deal is not only in form but in substance a different one. Without attempting to give an exclusive definition of "professional misconduct," I think it is clear that it has a more restricted meaning than the statutory expression, which latter might well include and would, on the evidence of Dr. MacAlister, the president of the council, be held by the council to include, certain breaches of professional etiquette which could not in my judgment be properly described as professional misconduct. "Misconduct in the exercise of his profession" would, I think, fairly express the meaning of "professional misconduct," whereas the statutory phrase would include this misconduct and also misconduct as a member of the profession, which would be a different thing. If I am right in this view as to the issue before me, neither of these documents is properly admissible, and the arguments founded on the judgments of the Court of Appeal in *Allinson* v. *General Council of Medical Education and Registration* (1), and on the judgment of the Privy Council in *Harvey* v. *Rex* (2), need not be further considered. I would add that in my opinion, even if the issue had been whether the plaintiff had been guilty of the conduct mentioned in the statute, the order would not have been admissible in proof of that fact, it being res inter alios acta. I can see no ground on which the report of the Committee can be received in evidence. [His Lordship then referred to the facts proved or admitted as above set out, and continued:—] On these facts can I come to the conclusion that the plaintiff has been guilty of "professional misconduct" as alleged? The only act of his own is his becoming a shareholder in and a director of the company. There is no contention that this amounted to misconduct. But assuming that he ought to be treated as responsible for the acts of the company, what is there in those acts which can amount to professional misconduct even if a wider meaning be given to the phrase than I think right? The employment of unregistered assistants is not, so far as I can see, contrary to any rule of professional conduct. I have read all the three pamphlets, and

(1) [1894] 1 Q. B. 750. (2) [1901] A. C. 601.

can see nothing in them except a puffing of American methods in comparison with those of other practitioners. Advertising is admittedly allowed in the profession, and I fail to see any professional misconduct in the publication of such pamphlets as these. In my opinion the defendant has not succeeded in justifying the notices of June 28 and August 20 on the ground alleged in them.

But it was contended in argument that the plaintiff had been guilty of an act calculated to bring discredit upon or to injure the defendant or the partnership business. The business is carried on in the name of the defendant, the plaintiff's name not appearing at all. The order of May 24 would not necessarily bring discredit upon the defendant nor injure him or the business, but if it does, I hold that the defendant has not by any proper evidence proved that the plaintiff has been guilty of any act calculated to have that effect. The plaintiff is therefore entitled to the declarations and the injunction asked for, and to the costs of the action.

I desire to add that I express no opinion as to the propriety or otherwise of the order of the General Medical Council. They are the tribunal appointed by statute to determine the particular question before them. That question was different from the one I have to determine, and the materials before them were different from those I had before me.

Solicitors: *H. P. Becher; H. Wilson.*

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Feb. 4.

PARKER J.
March 1, 2.

BAKE *v.* FRENCH.

[1906 B. 2699.]

Mortgage — Foreclosure — Order Nisi for Foreclosure on a principal Charge and Four supplementary Charges — Omission of Fifth supplementary Charge—Action for Foreclosure on the Six Charges—Res judicata—Practice — Costs — Set-off — Independent Proceedings — Consolidation Order — Rules of the Supreme Court, Order LXV., *rr.* 14, 27, *sub-r.* 21.

The defendant charged her property with repayment of 100*l.* and interest to the plaintiff, and subsequently gave him four supplementary charges to secure further advances. She then gave him another supplementary charge to secure a further advance and his professional costs. The plaintiff brought an action on the first five charges, omitting the sixth, which was mislaid, and obtained an order for foreclosure nisi. He afterwards found the sixth charge, and applied for an order extending the relief to that charge, but his application was dismissed with costs. He then brought a fresh action for foreclosure on all the six charges. The defendant took out a summons asking that the proceedings might be stayed on the ground that the plaintiff was estopped by the foreclosure order:—

Held, by Warrington J., that the subject-matter of the fresh action was not the same as that in the first action, and that in the circumstances the plaintiff was not estopped from setting up his present case, and that the defendant's application must be dismissed with costs.

The costs payable to the defendant in the first action having been taxed, an order was made by the Master consolidating the two actions, giving relief by way of foreclosure nisi in respect of all the six charges, and ordering taxation of the costs in both actions.

The plaintiff then applied that the costs payable to him under the order of Warrington J. might be directed to be set off against the costs payable by him in the first action:—

Held, by Parker J., following *David* v. *Rees*, [1904] 2 K. B. 435, that the provisions, as to set-off of costs, of Order LXV., rr. 14, 27, sub-r. 21, had no application to costs in independent proceedings; and that, notwithstanding the consolidation order, the costs were in independent proceedings; that, as under the practice before those rules there could be no set-off in independent proceedings otherwise than subject to the solicitor's lien for costs, the plaintiff's application must be dismissed with costs, but that these costs could be set off against the costs under the consolidation order.

By a memorandum in writing dated March 22, 1902, the Hon. Mrs. French charged her contingent reversionary interest

in certain securities with payment to Mr. Bake of 100*l.* advanced by him and interest at 5 per cent. On March 26 and on May 9, 17, and 21, 1902, she gave him other charges to cover further advances, amounting to 150*l.* These charges were in form receipts indorsed on the original charge of March 22, and stated that the provisions of that charge were to apply to them and be read as part thereof. Mr. Bake for many years acted as Mrs. French's solicitor, and in 1904 she owed him about 635*l.* for professional charges and disbursements. On December 9, 1904, Mr. Bake took out an originating summons asking for a declaration that under the first five memoranda he was entitled to an equitable lien or charge on Mrs. French's reversionary interest; an account of what was due; and that the security might be enforced by foreclosure or sale. On August 1, 1905, an order for foreclosure nisi in the ordinary form was made declaring that Mr. Bake was entitled to the lien in respect of the charge of March 22, 1902, and the "supplementary documents" of March 26, May 9, 17, and 21; directing accounts; ordering that on payment of what should be found to be due Mr. Bake should deliver up the memorandum and supplementary documents; and declaring that in default of such payment he would be absolutely entitled to the reversionary interest and to have an assignment of it from Mrs. French, and that she should be foreclosed from all equity of redemption.

On January 27, 1906, an order was made on a summons taken out by Mr. Bake declaring that his security did not include any of his professional charges or disbursements.

While the account was being taken Mr. Bake discovered a further memorandum which had been given to him by Mrs. French dated November 17, 1902, which had been mislaid and therefore omitted from his first claim. By this memorandum, which was in form similar to the other supplementary charges, she acknowledged the receipt of a further advance of 25*l.*; agreed that the provisions of the original charge should apply to this advance, and that the total sum secured was 275*l.*; and she also charged the property with the payment of the plaintiff's costs, charges and disbursements. Mr. Bake made an application by motion in chambers that the account might be extended so as

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to include what was due to him under the charge of November 17, 1902. This application was dismissed with costs by an order dated May 21, 1906, and he, on July 13, 1906, moved in Court to vary the order made in chambers. Buckley J., on the undertaking of Mrs. French to accept service of a new originating summons and not to raise any objection based on the fact that, she being out of the jurisdiction, procedure by originating summons was irregular, and stating that she would not raise in such new proceedings any contention based on the view that the order now in statement prevented such new proceedings, but reserving her right to raise the contention that the original judgment in the action was a bar to such proceedings, made no order on the motion except that Mr. Bake should pay to the defendant Mrs. French "her costs of the said motion, such costs to be taxed by the taxing Master."

Mr. Bake thereupon took out a new originating summons on July 12, 1906, asking for a declaration that the memoranda, including that of November 17, 1902, constituted a charge on the property, an account, foreclosure or sale, and, if necessary, that the proceedings in the old action might be consolidated with the new summons. On November 6, 1906, Mrs. French took out a summons asking that the proceedings on the new summons might be stayed on the ground that Mr. Bake was estopped by the judgment of August 1, 1905, for foreclosure nisi. This summons now came on for hearing.

Rowden, K.C., and *Ward Coldridge*, for the applicant. Mr. Bake ought not to be allowed to continue these proceedings. By the terms of the foreclosure order we are entitled to reconveyance of the property on repayment of the money advanced on the first five charges: Fisher on Mortgage, 5th ed. par. 1976. This is within the principle that if a man has a right of action he must enforce all his rights in respect of that particular matter in one action, and accident and inadvertence are no excuse for not doing so: *Henderson* v. *Henderson* (1); *Duchess of Kingston's Case*. (2) The new action is for foreclosure on the very property that was included in the order, and between the same parties as

(1) (1843) 3 Hare, 100, 114. (2) (1776) 2 Sm. L. C. 11th ed. p. 731.

those in the first action. Mr. Bake must be taken to have waived his right of action under the sixth charge. He is estopped by the order nisi. This is res judicata; a mortgagee cannot get two foreclosure judgments in respect of the same charge. This sixth charge is not distinct from the other five. They are all incorporated one with another as limbs of the same body, and must be taken together. By his first judgment the mortgagee purported to enforce the whole of his security, and he cannot sue on the same charges with the addition of another charge. If he wishes to sue on the sixth charge he must do so separately: *Higgens' Case* (1); *In re May.* (2)

Norton, K.C., and *E. Ford*, for the mortgagee, were not called upon.

WARRINGTON J. stated the facts, and continued:—This application is based on the ground of estoppel by res judicata. The applicant relies on the statement of the rule of law on the subject by Wigram V.-C. in *Henderson* v. *Henderson* (3), where he says: "I believe I state the rule of the Court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

What was the subject of the litigation with which the order of August 1, 1905, dealt? It was this, whether Mr. Bake was

(1) (1605) 6 Rep. 44b. (2) (1885) 28 Ch. D. 516.
(3) 3 Hare, 100, 114.

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entitled to a lien by virtue of the first five documents charging the property. What is it here? It is whether he is entitled to a charge under six documents of which the other five form part. It is not "the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest." How can it be said that the matter referred to in the sixth charge is res judicata by the foreclosure order? That particular charge was never dealt with on the first summons. All that the mortgagee was then asking for was a declaration that he was entitled to a lien in respect of the first five charges and a consequential order for foreclosure.

I cannot find on the terms of the order that the res which the Court now has to deal with is res judicata, nor that there is any estoppel which would prevent Mr. Bake from setting up the different case which he now sets up. There might have been a difficulty on the form of the proceedings, but for the fact that the applicant has undertaken not to take the objection. The new summons asks that so far as necessary the proceedings may be consolidated, and it seems to me that in asking for that Mr. Bake is doing all that the applicant is entitled to require him to do under the circumstances. It would be a denial of justice if I did not allow him to raise the point that, although the first five charges do not give him a lien for his professional charges and disbursements, the sixth charge does so. The summons must be dismissed with costs.

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The order on this summons, dated February 4, 1907, as drawn up ordered Mrs. French to pay to Mr. Bake his costs of the application in chambers and occasioned by the adjournment thereof into Court, such costs to be taxed by the taxing Master and to be payable out of the separate property which Mrs. French was then or might thereafter be possessed of or entitled to, and not otherwise, there being the usual proviso excepting separate property which she was or might be restrained from anticipating, unless by reason of s. 19 of the Married Women's Property Act, 1882, such property should be available to satisfy the order notwithstanding such restriction.

On February 12, 1907, the Master made an order in chambers, in the terms of minutes assented to by both parties, by which the Court declared a charge in favour of the plaintiff Mr. Bake in respect of all the securities; and directed that the two actions should be consolidated, and that the proceedings in the first action should be adopted in the consolidated actions, and that the two actions should thenceforth proceed as one, and gave the usual relief by way of foreclosure nisi in respect of all the securities, and directed taxation of the costs in both actions.

The costs payable to Mrs. French under the orders of May 21, 1906, and July 13, 1906, were taxed at 35*l.* 14*s.* The plaintiff Mr. Bake, on March 1, 1907, moved before Parker J., on notice to the defendant Mrs. French, for a stay of execution in respect of the costs under the orders of May 21 and July 13, 1906, pending taxation of the costs payable by Mrs. French to Mr. Bake under the order of February 4, 1907, and for directions as to setting off the costs under the order of February 4. He alleged that Mrs. French's solicitors were threatening to issue execution against him for the costs payable by him, and estimated the costs payable to himself at 33*l.*

Buckmaster, K.C., and *Edward Ford*, for the plaintiff. By Order LXV., r. 14, "a set-off for damages or costs between parties may be allowed notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought." In *Blakey* v. *Latham* (1) Kay J. said that the rule gave the Court a complete discretion, and that it applied to costs in the same action so as to allow a right of set-off, which was not intercepted by the solicitor's lien, although the set-off of costs in different actions was intercepted by the lien. By Order LXV., r. 27, sub-r. 21, in any case in which "a party entitled to receive costs is liable to pay costs to any other party, the taxing officer may tax the costs such party is so liable to pay, and may adjust the same by way of deduction or set-off." In *Wright* v. *Mudie* (2) Leach V.-C. held that there was not a set-off of costs in a suit against costs of an action between the same parties.

(1) (1889) 41 Ch. D. 518. (2) (1823) 1 S. & S. 266, 267.

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In *Goodfellow* v. *Gray* (1) the Court of Appeal held that damages in one action might be allowed to be set off against damages in another action, although the solicitor in an action had obtained a charging order, but the distinction between that case and the case of costs in different actions is pointed out. In Chancery, costs in one suit receivable and payable by two parties were ordered to be mutually set off without regard to the lien of the solicitors: *Cattell* v. *Simons.* (2)

The consolidation order has now made the proceedings one action, even if it could previously be said that there were two independent proceedings, and therefore the set-off should be allowed.

Romer, K.C., and *Ward Coldridge*, for the defendant. Warrington J. held that the subject-matter of the second action was not the same as that in the second action; and there were therefore two independent proceedings. The authorities are clear that there was no jurisdiction to direct a set-off in the Court of Chancery. In *Wright* v. *Mudie* (3) Leach V.-C. says that *Taylor* v. *Popham* (4) "is not an authority for setting off, against each other, the costs of different causes in this Court; and still less, for setting off costs here against costs in the King's Bench, when it is clear that that Court would not permit the set-off of costs there against the costs here."

[PARKER J. referred to *In re Harrald.* (5)]

Chitty J. held that Order LXV., r. 14, did not apply to costs in independent proceedings, e.g., an action in a county court and an action in the High Court: *Hassell* v. *Stanley.* (6) And in *David* v. *Rees* (7) the Court of Appeal held that Order LXV., rr. 14 and 27, sub-r. 21, did not apply to cases in which the costs were in distinct and independent litigations. *Edwards* v. *Hope* (8) is also in our favour.

The consolidation order cannot affect the rights of parties which have been already ascertained.

Buckmaster, K.C., in reply.

Cur. adv. vult.

(1) [1899] 2 Q. B. 498.
(2) (1843) 6 Beav. 304.
(3) 1 S. & S. 266, 267.
(4) (1808) 15 Ves. 72.
(5) (1883) 52 L. J. (Ch.) 435; (1884) 53 L. J. (Ch.) 505.
(6) [1896] 1 Ch. 607.
(7) [1904] 2 K. B. 435.
(8) (1885) 14 Q. B. D. 922.

March 2. PARKER J. In the first of these actions the plaintiff obtained the usual order nisi for foreclosure in respect of certain securities created by the defendant Mrs. French, and he subsequently attempted to have the judgment varied by the inclusion in it of another security which had been accidentally omitted from the action. The application for that purpose was dismissed with costs.

The plaintiff then instituted a second action against the same defendants, asking relief by way of foreclosure, not only in respect of the securities which were the subject of the first action, but also in respect of the security accidentally omitted from that action. The defendant Mrs. French applied for a stay of proceedings in the second action, and her application was dismissed with costs.

On February 12, 1907, the Master, whom I have seen since yesterday, made an order in chambers in the terms of minutes to which, he tells me, both parties assented. The order has not yet been drawn up, but I have the minutes before me, and, according to those minutes, the Court declares a charge in favour of the plaintiff not only in respect of the securities which were the subject of the first action, but also in respect of the security omitted from that action, and then directs that the two actions shall be consolidated and that the proceedings in the first action shall be adopted in the consolidated actions, and that the two actions shall proceed henceforth as one. Then follows the usual relief by way of foreclosure nisi in respect of all the securities, including that which was omitted from the first action but included in the second action.

The plaintiff is now moving to have the costs payable by him in the first action set off against the costs payable to him under the order in the second action. Now I think I must take it, on the authority of *David* v. *Rees* (1), that the provisions of Order LXV., rr. 14 and 27, sub-r. 21, have no application to costs incurred in independent proceedings. Having regard to that case and also to the case, therein cited, of *Barker* v. *Hemming* (2), I do not think I can treat these two actions as other than independent proceedings, unless it be by reason of the order for

(1) [1904] 2 K. B. 435. (2) (1880) 5 Q. B. D. 609.

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consolidation to which I have referred. I have caused inquiries to be made, and I find that, notwithstanding the consolidation of the two actions, process of execution under each order by which costs were directed to be paid would be in the action in which the order was made, and not in the consolidated action.

Moreover, even if that were not so, an order for consolidation, which is intended to deal with the future procedure in the actions which are consolidated, in my judgment ought not in principle to be construed as altering the rights of parties under orders already made in one or other of the actions consolidated.

I must, therefore, deal with this motion on the footing that the consolidation does not affect the matter, and, inasmuch as the Rules of Court I have referred to have no application to independent proceedings, I must consider the question, what would have been the practice prior to the making of those rules? It seems to me that the practice of the Court independently of those rules was not to allow any set off of costs in independent proceedings otherwise than subject to what is called, in the reported cases, "the solicitor's lien for costs." This appears, I think, from the cases of *Wright* v. *Mudie* (1) and *In re Harrald.* (2) It follows, therefore, that I am unable to grant the relief asked for by the motion, which must be dismissed. The defendant's costs of the motion will be taxed, and although I cannot direct them to be set off against the costs which have been ordered to be paid to the plaintiff by the defendant in the second action, yet, inasmuch as the consolidation order directs taxation of the costs of the two actions, I see no reason why I should not direct the taxed costs of this motion to be set off against the costs to be taxed under the consolidation order, and I accordingly direct the costs of the motion to be set off against the taxed costs under the consolidation order, and, if necessary, against the amount which appears to be due on taking the account.

Solicitors for plaintiff: *Cooper & Bake.*
Solicitors for defendant: *Fowler & Co.*

(1) 1 S. & S. 266. (2) 52 L. J. (Ch.) 435; 53 L. J. (Ch.) 505.

F. E.

DIBDEN *v.* SKIRROW.

NEVILLE J.

1907

[1905 D. 529.]

Jan. 18, 19, 21, 22, 23, 24.

Franchise—Ancient Ferry—Bridge—Traffic diverted from Ferry—Total loss of Tolls—Disturbance of Ferry.

The franchise of a ferry is not a grant of the exclusive right to carry across a stream by any means whatever, but only a grant of the exclusive right to carry across by means of the ferry.

Where, therefore, a bridge was constructed by private enterprise across a river near to an ancient ferry and connecting the same highways as the ferry, so that the public used the bridge to cross the river and entirely ceased to use the ferry, whereby the ferry owner lost all the income he used to receive from tolls on the ferry:—

Held, that the bridge was not a disturbance of the ferry, and that the ferry owner had no remedy.

Judgment of Blackburn J. on this point in *Reg.* v. *Cambrian Ry. Co.*, (1871) L. R. 6 Q. B. 422, 430, not followed.

Dictum of Mellish L.J. in *Hopkins* v. *Great Northern Ry. Co.*, (1877) 2 Q. B. D. 224, 230, approved and followed.

ACTION.

This was an action to obtain an injunction to restrain interference with an ancient ferry by the construction of a bridge under these circumstances.

The plaintiff was the owner of a ferry across the river Wye at Brockweir, in Gloucestershire, connecting the highway leading to the village of Brockweir on the Gloucestershire side with the highway on the Monmouthshire side leading to Tintern and Monmouth.

The Wye at Brockweir was a tidal navigable river. The defendants represented a committee of landowners in the neighbourhood of Brockweir formed for the purpose of constructing a bridge, for foot passengers and vehicles, across the Wye at a point about sixty yards below the ferry. The bridge was to be twenty feet wide, with approaches on each side supported by embankments and connecting with the highways above mentioned, the intention being that the bridge on completion should be taken over and maintained by the local authorities as a free bridge for the use of the public.

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In April, 1905, the defendants, having obtained the sanction of the Board of Trade, commenced the construction of the bridge, and the plaintiff at once issued the writ in this action. He alleged that he and his predecessors in title had from time immemorial enjoyed and maintained the said ferry, and that since he had become the owner of the ferry he had maintained boats for the service of the ferry and conveyed all persons desiring to cross the ferry and received a toll of one penny for each person. He further alleged (amongst other things) that by the construction of the bridge the defendants would injure his ferry and would deprive him of the income he derived from the tolls on the ferry; and he claimed (inter alia) an injunction restraining the defendants and their agents from constructing the bridge so as to interfere with and injuriously affect his ferry. The defendants traversed all the allegations of the plaintiff. They alleged (amongst other things) that in 1876 the Wye Valley Railway built a station at Tintern, and that since that date the residents in Brockweir and the neighbourhood had largely increased and had found it necessary to construct the bridge for the purpose of obtaining access to the railway station and to the towns and villages on the other side of the river. The action now came on for trial, and a considerable body of evidence was adduced on both sides on the various issues raised in the action, but the only point calling for a report was whether the bridge was a disturbance of the ferry. It appeared that the bridge was completed and opened to the public in August, 1906, and that since then the public had crossed by the bridge and had entirely ceased to use the ferry. The plaintiff's income from tolls on the ferry for the three years preceding August, 1906, had averaged about 120*l.* per annum.

Jenkins, K.C., and *R. C. Glen*, for the plaintiff. The evidence shews the plaintiff and his predecessors to have been in possession of an ancient ferry for a period sufficient to support the presumption of the grant of a franchise from the Crown: *Huzzey* v. *Field* (1); *Trotter* v. *Harris* (2); *Peter* v. *Kendal*. (3)

(1) (1835) 2 C. M. & R. 432, 440. (2) (1828) 2 Y. & J. 285.
(3) (1827) 6 B. & C. 703, 710.

[NEVILLE J. Assuming that the plaintiff has an ancient ferry for foot passengers, and that the bridge is intended to carry the same traffic, is the bridge a disturbance of the ferry?]

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We submit that it is. The franchise of a ferry is the exclusive right of carrying passengers across from one side of a river to the other. Anything built across the river so near to the ferry that it diverts the traffic from the ferry is an interference with the rights of the ferry owner. There is no direct authority on the point, but there are conflicting dicta. The point arose in *Reg.* v. *Cambrian Ry. Co.* (1), but was not argued, and Blackburn J., in his judgment, after stating that the franchise of a ferry is the exclusive right to carry passengers across the river, says (2): "It is well established that if that right is interfered with, without the authority of an Act of Parliament, by something which carries passengers across so close to it as to disturb the right, an action would lie for that disturbance." He then points out that all the earlier authorities have been cases of disturbance by boats, and adds: "But I cannot bring my mind to doubt the principle that if a bridge were to be erected across a ferry, and people were to go across the bridge, and consequently the bridge would have the effect of disturbing of the owner of the ferry in his right, he would be entitled to bring an action on the case, and to recover damages." The decision in that case was based, however, mainly on another point that was overruled by the Court of Appeal in *Hopkins* v. *Great Northern Ry. Co.* (3); but Mellish L.J. (who delivered the judgment of the Court) refers to this opinion of Blackburn J., and observes (4): "Now we apprehend that the owner of a ferry has not a grant of an exclusive right of carrying passengers and goods across the stream by any means whatever, but only a grant of an exclusive right to carry them across by means of a ferry." That, no doubt, is a strong observation, but it was not necessary for the decision of the case, and later on he says (5): "This, however, is not the point which we have to decide. It may be that if a person built and opened a bridge in the line of a ferry, so as to enable persons and goods to be

(1) L. R. 6 Q. B 422.
(2) Ibid. 430.
(3) 2 Q. B. D. 224.
(4) Ibid. 230.
(5) 2 Q. B. D. 233.

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conveyed from the highway on which one terminus of the ferry was situate to the highway on which the other terminus was situate, he ought to be held to have indirectly violated the rights of the owner of the ferry: but that is not what the defendants have done"; and further on he again assumes (1) "that an action might, under some circumstances, be maintained by an owner of a ferry for the disturbance of his ferry by the opening of a bridge": so that the point was, it is submitted, left open for decision when it should arise. In the present case, what the defendants have done is in direct violation of the rights of the plaintiff as the ferry owner. In *Hopkins* v. *Great Northern Ry. Co.* (2) the footbridge was constructed under the statute as the means of access to the railway station, and it was not the construction of the bridge but the user of it by the public for other purposes, which was a trespass for which the railway were held not liable, that caused the injury to the ferry. Here the bridge is built by private individuals and connects the same two highways, and entirely diverts the traffic that formerly passed over the ferry. The franchise of a ferry is a monopoly. The public are entitled to use the ferry, and the ferry owner is bound to be in attendance at all reasonable times, and to maintain boats and to charge a reasonable toll, otherwise he will be fineable: per Sir Matthew Hale in his treatise De Jure Maris, cited in *Attorney-General* v. *Simpson*. (3) The Crown guarantees the ferry owner the enjoyment and possession of his exclusive right to carry passengers from one side of the stream to the other by means of the ferry, and the ferry owner cannot build a bridge in substitution for his ferry: *Payne* v. *Partridge*. (4) Anything done with the intention of diverting the traffic from the ferry is an interference with the ferryman's right and a disturbance of his ferry. Here the building of the bridge close to the ancient ferry to connect the same highways and to carry the same traffic is in derogation of the ferry owner's rights and an actionable wrong. The completion of the bridge may affect the plaintiff's remedy by injunction, but does not disentitle him to damages. The defendants may rely on

(1) 2 Q. B. D. 235.
(2) Ibid. 224.
(3) [1901] 2 Ch. 671, 718.
(4) (1690) 1 Salk. 12; S. C. sub nom. *Pain* v. *Patrick*, 3 Mod. 289.

Newton v. *Cubitt* (1) and *Cowes Urban Council* v. *Southampton, &c., Steam Packet Co.* (2), but they have no application to the present case.

Upjohn, K.C., and *F. Thompson*, for the defendants, were not called upon.

NEVILLE J. The main question I have to decide in this case is a question of law, and it is whether, under the circumstances, the building of a bridge, which is adapted for the carriage of foot passengers as well as of vehicular traffic, is a disturbance of the plaintiff's ferry, assuming it to be an ancient ferry. I think it is unnecessary for me to determine whether or not this ferry is an ancient ferry. I will only say that a considerable body of testimony has been adduced shewing the user of the ferry and the receipt of tolls for something like sixty or seventy years, and, if the question had to be determined, it would probably be right and necessary for the Court to find some legal origin for the right thus exercised. But inasmuch as in my view of the case the erection and user of the bridge is not a disturbance of the plaintiff's right, assuming he has an ancient ferry, it seems to me unnecessary to say more on that question. Another issue that has been raised is whether or not the traffic carried over the bridge is the same traffic in a legal sense as the traffic of which the ferry owner had the monopoly. With regard to that it seems to me that, whatever other traffic the bridge may carry, the evidence is clear that it carries the whole of the traffic that was formerly carried by the plaintiff, because his uncontradicted evidence is that from the day the bridge was opened he has never had a paying passenger to ferry across the river. I think, therefore, that the cases of *Newton* v. *Cubitt* (1) and *Cowes Urban Council* v. *Southampton, &c., Steam Packet Co.* (2) have no application to the present case. Now the question as to the disturbance of the plaintiff's ferry by the building and intended dedication to the public of the bridge depends upon which is the better of two opinions expressed in the cases of *Reg.* v. *Cambrian Ry. Co.* (3) and *Hopkins* v. *Great Northern*

(1) (1862) 12 C. B. (N.S.) 32.
(2) [1905] 2 K. B. 295.
(3) L. R. 6 Q. B. 422.

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Ry. Co. (1) In the first case the question whether the erection and user of a foot-bridge was a legal disturbance of the owner of a neighbouring ferry was necessary for the decision of the case. The question there was whether or not, by the building of a bridge, which was subject to a toll under an Act of Parliament, the plaintiff's lands, which included his ferry, were injuriously affected under the Lands Clauses Consolidation Act. I think they would not have been injuriously affected, unless something had been done to give an actionable right had the Act not been passed, and the Court held that the lands were injuriously affected. The point was before the Court on that occasion, but the defendants' counsel did not argue it. They rather conceded it and relied on another point, namely, that the injury complained of was caused by the user of the railway and not by the creation of the bridge, and that consequently the plaintiff's rights were excluded by the principle laid down in *Brand* v. *Hammersmith and City Ry. Co.* (2) But Blackburn J. refers to the point in his judgment, and, of course, one has to consider very carefully what he says about it. The whole question really depends upon whether the proposition which he states with regard to the right of a ferry owner is justified by the decisions which existed then and which exist now upon the point. He says (3): "It is well established that if that right is interfered with, without the authority of an Act of Parliament, by something which carries passengers across so close to it as to disturb the right, an action would lie for that disturbance." The whole point to my mind is whether that proposition is not too wide where he says "something which carries passengers across." He goes on to say that in all the cases that have been decided up to that time, so far as he knows, "the something which carried passengers across" and was a disturbance of the ferry was a carrying across by boats. Consequently the earlier decisions are only to the effect that to carry passengers across in a boat who would otherwise have gone by the ferry is a legal disturbance of the ferry right. Now that case was before the

(1) 2 Q. B. D. 224. (2) (1869) L. R. 4 H. L. 171.
(3) L. R. 6 Q. B. 430.

Court of Appeal in *Hopkins* v. *Great Northern Ry. Co.* (1), and Mellish L.J., in delivering the judgment of the Court, deals with that proposition of Blackburn J. He says (2): "Now we apprehend that the owner of a ferry has not a grant of an exclusive right of carrying passengers and goods across the stream by any means whatever, but only a grant of an exclusive right to carry them across by means of a ferry." He then refers to the case of *Payne* v. *Partridge* (3), in which it was laid down that the owner of a ferry could not substitute for the ferry a bridge built by himself. It seems to me that that case is not without some substantial bearing on the point that I have to decide, because I think it amounts to a decision that the obligation of the ferryman was to carry by water and that he could not substitute any other means of getting passengers from one side of the river to the other. Now, prima facie, I should think that the right and obligation of the owner of a ferry would be commensurate. If his obligation is to transport by any means whatever from one side of the river to the other, it is difficult to see why he should not transport his passengers by bridge as well as by boat. If, on the other hand, his right is only to transport by boat, then it is difficult to see how the building of a bridge in order to transport in a totally different way can be a disturbance of his right. Therefore the question comes back to the narrow point whether the granting of a franchise of a ferry is a grant to carry in any way across a river, or whether it is a grant to carry by boat only. If it is a grant to carry in any way, then I think the bridge is a disturbance of the ferry; but if it is a grant to carry across by boat only, then I think it is not a disturbance of the ferry. Having to judge which of these two statements made by such very eminent authorities is the right view, it seems to me that the limited interpretation put by Mellish L.J. upon a franchise granted to a ferry owner is the more correct interpretation. I think that what is pointed out in the passage in Sir Matthew Hale's treatise De Jure Maris, cited in *Attorney-General* v. *Simpson* (4), assists one to that conclusion, because it

(1) 2 Q. B. D. 224.
(2) Ibid. 230.
(3) 1 Salk. 12; S. C. sub nom. *Pain* v. *Patrick*, 3 Mod. 289.
(4) [1901] 2 Ch. 671, 718.

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is there laid down that the granting of a franchise to a ferry owner which involves a monopoly is not granted for the benefit of the ferry owner, but is granted for the benefit of the public, as a means whereby the public may be certain of finding means of transit across the river. The monopoly is given in return for an obligation on the ferryman's part to maintain boats and means so that the public may be transferred across and may go from one side to the other at any time. But suppose the public are put in possession of a different and more convenient means of crossing the stream, it is obviously not in any way to their advantage to insist upon still going by the ferry, and the very purpose for which the franchise was granted to the ferryman to a great extent becomes obsolete when another and more convenient means of passage is found. I have therefore come to the conclusion that the plaintiff's case on this issue fails, apart from any other considerations, because the building of the bridge is not an infringement of his right, even presuming it to have been granted by charter, to ferry passengers across the river at this point. There remain some minor points for decision. [His Lordship then dealt with the other issues raised in the case, and held that the plaintiff's action failed on all points and must be dismissed with costs.]

Solicitors: *Doyle, Devonshire & Co., for Williams & Sons, Monmouth; Gamlen, Burdett & Co., for Evans & Evill, Chepstow.*

H. L. F.

PARKER J.

1907

Feb. 1, 2.

In re JACOB.

MORTIMER *v.* MORTIMER.

[1906 J. 2149.]

Will—"Bequest of Personal Property described in a general Manner"—Exercise of General Power of Appointment—Gift of Stocks, Shares and Securities—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 27.

A married woman, having general powers of appointment under her marriage settlement and her father's will (subject to a life interest in her husband) over personal property which at the time of her death consisted of railway and colonial stocks, made a will by which subject to her husband's life interest she bequeathed to her three sisters "all stocks, shares and securities which I possess or to which I am entitled." The husband survived the testatrix:—

Held, that there was a "bequest of personal property described in a general manner" within the meaning of s. 27 of the Wills Act, 1837, which operated as an appointment of the stocks under the powers.

Turner v. *Turner*, (1852) 21 L. J. (Ch.) 843, followed.

On November 12, 1862, a marriage was solemnized between Edward Long Jacob and Jane Gordon Mortimer, and by a settlement made on the occasion of the marriage forty shares in the London Joint Stock Bank, which belonged to Jane Gordon Mortimer and had been transferred to the trustees of the settlement (and any investments of the proceeds of sale thereof), were directed to be held in trust to pay the income to the wife during the joint lives of her husband and herself for her separate use without power of anticipation, and after the death of either to the survivor for life, and after the death of the survivor to stand possessed of the shares in trust for the children of the marriage, and if there should be no child who being a son should attain twenty-one, or being a daughter should attain that age or marry under it, then if Edward L. Jacob should survive his wife in trust for such person or persons and for such purposes as the wife should by will or codicil appoint, and in default of appointment for the persons who would have been entitled as next of kin to the wife if she had died intestate without having been married.

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George Ferris Whidbane Mortimer, the wife's father, died on September 7, 1871, having by his will given certain specific and pecuniary legacies, and also 100 shares in the City Bank, to Jane Gordon Jacob, and gave his residuary estate to trustees upon trust to pay the income to his wife for life and after her death upon trust for his children equally. By the same will the legacies of each of the testator's daughters and her share of residue were directed to be held in trust to pay the income to the daughter for life, and after her death to her husband for life, and after the death of the survivor, in case there should be no child of the marriage, to hold the corpus in trust for such person or persons and for such purposes as the daughter should by will or codicil appoint, and in default of appointment in trust for her next of kin as if she had died unmarried.

There never was any issue of the marriage of E. L. Jacob and his wife, and she died on April 10, 1899, having made a will as follows: "Subject to my husband Edward Long Jacob's life interest therein and to his enjoyment of the annual income thereof, I bequeath to my sisters Elizabeth Mortimer, Isabella Mary Mortimer and Louisa Mortimer, or to the survivors or survivor thereof, all stocks, shares and securities which I possess or to which I am entitled, and I desire that after the death of my husband Edward Long Jacob all such stocks, shares and securities shall become the absolute property in equal proportions of my aforesaid sisters Elizabeth Mortimer, Isabella Mary Mortimer and Louisa Mortimer, and I appoint my brother Alexander Mortimer my executor of this my last will and testament."

E. L. Jacob survived his wife and died on May 25, 1906, and the widow of G. F. W. Mortimer died on August 7, 1901.

At the time of the death of Jane Gordon Jacob the settlement funds consisted of 1176*l.* 13*s.* 7*d.* Cape of Good Hope loan, 1883 (4 per cent.), and 500*l.* New South Wales 3*l.* 10*s.* per cent. stock (1918); the 100 shares in the City Bank given by the will of G. F. W. Mortimer had been sold and replaced by 515*l.* Ealing rent-charge 4*l.* 10*s.* per cent. (Metropolitan Railway) and 880*l.* Great Northern Railway consolidated 4 per cent. perpetual preference stock; and Jane Gordon Jacob's share of the residue

under the same will was represented by 686*l.* Metropolitan Railway Company 3½ per cent. preference stock, and the sum of 17*s.* 2*d.* in cash. Elizabeth Mortimer died in July, 1905, and her executors were Henry Beaufoy Mortimer and Lewis Gordon Mortimer.

An originating summons was issued by Alexander Mortimer (as surviving trustee of the marriage settlement and one of the trustees of the will of G. F. W. Mortimer and legal personal representative of Jane Gordon Jacob) and Christian Mortimer (as the other trustee of the will of G. F. W. Mortimer) against Isabella Mary Mortimer, Louisa Mortimer, Henry Beaufoy Mortimer, Lewis Gordon Mortimer, and Brooke Cunliffe Mortimer, (who was one of the next of kin of Jane Gordon Jacob) for the determination of certain questions, including the following: (1.) Whether the will of Jane Gordon Jacob operated as an exercise of the general power of appointment by will conferred on her by the marriage settlement in respect of the trust funds thereby settled; (2.) whether the same will operated as an exercise of the general power of appointment conferred on Jane Gordon Jacob by the will of G. F. W. Mortimer in respect of the legacy and share of residue thereby settled for her benefit.

Alfred Adams, for the plaintiffs, stated the facts and the questions raised by the summons.

Stokes, for the defendants Isabella Mary Mortimer and Louisa Mortimer. The question is whether the bequests by the will of Mrs. Jacob of all her stocks, shares and securities is a "bequest of personal property described in a general manner" within the meaning of s. 27 of the Wills Act, 1837. It is submitted that the will is within the section, and operates as a good appointment under the general powers given by the settlement and the will of G. F. W. Mortimer.

[He was stopped.]

Gerard S. Sanders, for the defendants Henry Beaufoy Mortimer and Lewis Gordon Mortimer (executors of Elizabeth Mortimer). I support the same contention. The paraphrase of s. 27 by Buckley J. in *In re Salvin* (1) supports this view.

(1) [1906] 2 Ch. 459, 464.

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D. D. Robertson, for the defendant Brooke Cunliffe Mortimer. Sect. 27 of the Wills Act does not apply. Even if a gift of stocks, shares and securities is a "bequest of personal property described in a general manner," it cannot be said that the testatrix was possessed of or entitled to the property. She had not taken steps to make the property her own, as in *Chandler* v. *Pocock*. (1) The case is more like *In re Greaves' Settlement Trusts* (2), where it was held that the general power had not been exercised. But this is not a bequest of personal property described in a general manner, like a pecuniary legacy, as in *Hawthorn* v. *Shedden* (3), but a bequest of personalty described in a specific way.

The state of circumstances in which the section was intended to operate was where there was a general power to appoint, and the testator, without referring to the power, gave all that was his own property, as in *Webb* v. *Honnor*. (4) In *In re Wilkinson* (5) Selwyn L.J. says: "The enactment was intended to get rid of the difference between property and power, and to make it unnecessary in framing a will to refer to the instrument creating the power or to the actual subject of the power." But the cases do not extend to such a gift as this. [He also referred to *Turner* v. *Turner* (6) and Farwell on Powers, 2nd ed. pp. 176, 227.]

Stokes, in reply. *Turner* v. *Turner* (6) is an authority in my favour, for in that case a gift of such part of the testatrix's personal estate as should consist of money or securities for money was held to be a bequest of property "described in a general manner." In *Hurlstone* v. *Ashton* (7) Wood V.-C. says: "If a testator has a power over jewels or leaseholds, and gives 'all my jewels,' or 'all my leaseholds,' these gifts would be an exercise of his power." [He also referred to the judgment of Jessel M.R. in *Chandler* v. *Pocock*. (8)]

PARKER J. At the time of her death the testatrix had two general powers of appointment over property consisting almost entirely of stocks, shares and securities. By her will she

(1) (1881) 16 Ch. D. 648.
(2) (1883) 23 Ch. D. 313.
(3) (1856) 3 Sm. & Giff. 293.
(4) (1820) 1 Jac. & W. 352.
(5) (1869) L. R. 4 Ch. 587, 589.
(6) 21 L. J. (Ch.) 843.
(7) (1865) 11 Jur. (N.S.) 725.
(8) (1880) 15 Ch. D. 491.

disposed of all stocks, shares and securities which she possessed or to which she was entitled. Sect. 27 of the Wills Act provides that "a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will." It has been often said, and is now a platitude, that the object of the section was to abolish the distinction between property and a general power over property, because an ordinary man considers in the latter case that the property is his own. The question is whether the gift contained in Mrs. Jacob's will is a gift of property described in a general manner. In my judgment it is such a gift, and if any authority is wanted to support that view it is to be found in *Turner* v. *Turner*. (1) In that case a testatrix, having at the time of her death a general power of appointment, by her will gave such part of her personal estate as should consist of money or securities for money to certain persons specifically named, and gave all the rest, residue and remainder of her personal estate to certain other persons therein named. The general power of appointment which she had extended to a sum in Consols, certain leasehold ground-rents, and some shares in an insurance company, and it was held that the gift of such part of the personal estate as should consist of money or securities for money was a bequest of property "described in a general manner" within the meaning of the section. There was a question which of the things I have mentioned were included in that general description, and Parker V.-C. held that the shares in the insurance company were not included, and on that ground that they went to residuary legatees. On the other hand, he held that the Consols passed under the gift of moneys or securities for money.

The decision shews that a gift of "stocks, shares and securities" is a "bequest of personal property described in a general manner" within the meaning of s. 27.

(1) 21 L. J. (Ch.) 843.

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The only point remaining is whether a "contrary intention" appears by the will. As to this it is suggested that the words "which I possess or to which I am entitled" do not point to the exercise of a power, but to a gift of property which was in the actual possession of the testatrix. If that were so, it would be very difficult to apply s. 27 at all, because a testator purporting to make a bequest of his property must refer to the property in some such way as "my property," or "property which I possess or to which I am entitled."

In my judgment the effect of s. 27 is that the testatrix did by her will exercise the powers to the extent to which the property subject to the powers consisted of stocks, shares and securities. As to any other property which is not within that description the powers are not exercised.

Solicitors for all parties: *Bell, Brodrick & Gray.*

F. E.

PARKER J. 1907 *Feb.* 7.

In re WILSON. WILSON *v.* BATCHELOR.

[1906 W. 3154.]

Will—Next of Kin according to the Statute of Distribution—Time for ascertaining Class.

A testator directed that the trustees of his will should stand possessed of a fund, and the investments and income thereof, upon trust to pay the income to his nephew S. during his life, and after his death in trust in equal shares for the children of S. who being sons should attain twenty-one, or being daughters should attain that age or marry, and for the issue (living at that time who being males should attain twenty-one, or being females should attain that age or marry) of any child of S. who died in his lifetime leaving issue living at his death, so that such issue should take equally the shares which their parent would have taken. And the testator, after empowering his trustees, in addition to the powers of maintenance, education, and accumulation of surplus income given to trustees by statute, at any time after the death of S., or during his life with his written consent, to raise not exceeding half of the expectant or vested share of any child or other his issue and to apply the same for his advancement or benefit, declared as follows: "If no child or other issue of my said nephew S. lives to attain a vested interest under the trusts hereinbefore contained, then, subject to the trusts

hereinbefore declared or referred to in favour of my said nephew S. and his issue, I direct that the trust fund and the income thereof and all statutory accumulations of income (if any) or so much thereof respectively as shall not have been applied under any of the powers hereinbefore contained or referred to shall be in trust for such person or persons as on the death of my said nephew S. will be entitled to [*sic*] as my next of kin under the Statute for the Distribution of Intestates' Estates."

The testator died in 1884, and his nephew S. was then his sole next of kin. S. died in 1906, having made a will and appointed executors :—

Held, that, notwithstanding the death of S. was not necessarily the period of distribution, the class to take were the next of kin of the testator at the time of his death, and not the class who would have been his next-of-kin, according to the Statutes of Distribution, had he died when S. died, and that the executors of S. were entitled to the fund.

Sturge and Great Western Ry Co., (1881) 19 Ch. D. 444, distinguished.

WILLIAM WILSON died on May 9, 1884, having by his will declared that his trustees or trustee should stand possessed of certain investments thereinafter called "the said trust fund" and of the annual income thereof upon the trusts following :—

"Upon trust to pay the said income to my nephew Samuel Eyres Wilson during his life, and after his death in trust in equal shares for all or any of the children of my said nephew Samuel Eyres Wilson living at the time of his decease who being sons or a son attain the age of twenty-one years, or being daughters or a daughter attain that age or marry, and for all or any of the issue (living at that time who being males or a male attain the age of twenty-one years or being females or a female, attain that age or marry) of any child of my said nephew Samuel Eyres Wilson who dies in his lifetime leaving issue living at the time of his death, so that such issue shall take, through all degrees according to their stocks and in equal shares, the share or shares which their parent would have taken, if living at the time aforesaid, and so that no issue shall take whose parent is living at the time aforesaid and so capable of taking. I empower the trustees or trustee, in addition to the powers of maintenance, education, and accumulation of surplus income given to trustees by statute, at any time or times after the death of my said nephew Samuel Eyres Wilson, or during his life with his consent in writing, to raise any part not exceeding one-half of the expectant or vested share of any child or other his issue under

PARKER J. 1907 WILSON, *In re.* WILSON *v.* BATCHELOR.

the trusts hereinbefore declared, and to pay or apply the same for his or her advancement or benefit as the trustees or trustee shall think proper. And I declare that if no child or other issue of my said nephew Samuel Eyres Wilson lives to attain a vested interest under the trusts hereinbefore contained, then, subject to the trusts hereinbefore declared or referred to in favour of my said nephew Samuel Eyres Wilson and his issue, I direct that the trust fund and the income thereof and all statutory accumulations of income (if any), or so much thereof respectively as shall not have been applied under any of the powers hereinbefore contained or referred to, shall be in trust for such person or persons as on the death of my said nephew Samuel Eyres Wilson will be entitled to [*sic*] as my next of kin under the Statute for the Distribution of Intestates' Estates."

Samuel Eyres Wilson was the sole next of kin of William Wilson living on William Wilson's death, and he died without issue on July 23, 1906, having made a will and codicil which were proved by his executors, Albert William George Batchelor, John H. W. Vowler-Simcoe, and Joseph B. Davis.

James Allen Wilson, William Reginald Wilson, and Mary Anna Maria Fosbery (widow), were second cousins of William Wilson, being grandchildren of another William Wilson (who died in 1829), who was a son of John Wilson, whereas the testator William Wilson was a grandson of Thomas Wilson, another son of John Wilson; and James Allen Wilson, William R. Wilson, and Mary A. M. Fosbery claimed to be the only next of kin of William Wilson, the testator, living at the death of Samual Eyres Wilson.

An originating summons was taken out by James Allen Wilson, William Reginald Wilson, and Mary Anna Maria Fosbery, claiming to be the only next of kin of the testator at the date of the death of Samuel Eyres Wilson, against Albert W. G. Batchelor (trustee of the will of William Wilson) and John H. W. Vowler-Simcoe and Joseph B. Davis, who (with A. W. G. Batchelor) were the legal personal representatives of Samuel Eyres Wilson, the summons raising the questions (1.) at what period the next of kin of the testator, William Wilson, ought to be ascertained upon the true construction of his will

in consequence of the death of Samuel Eyres Wilson without issue, and (2.) an inquiry who were the testator's next of kin at that period.

Buckmaster, *K.C.*, and *E. A. Jennings*, for the plaintiffs. The question is whether the next of kin are to be determined as at the date of the death of the tenant for life or as at the date of the testator's death. The sole next of kin at the latter period was S. E. Wilson himself, and if the next of kin at that time are to take his legal personal representatives will be entitled to the fund. There is a general impression that a gift to next of kin according to the statute means that they are to be ascertained at the testator's death, but the authorities point to the conclusion that where the period of possession is postponed by the intervention of a life estate, although the class is ascertained at the testator's death, only those take who are in existence when the life estate has determined. That may not be unreasonable, although many judges have only acquiesced in such a construction because they considered themselves bound by authority. Here, however, there is a distinguishing feature, viz., that by the gift to the children and issue of the tenant for life the period of distribution cannot be fixed and may not be synchronous with the death of the tenant for life. In such a case the testator cannot have been contemplating that the class should be determined at his death. The distinction suggested runs through a series of authorities, the earlier cases of which were analysed in *Wharton* v. *Barker*. (1) In that case Page Wood V.-C. says (2): "In the first place, I find it decided by a continuous stream of authority, interrupted a little possibly by some decisions of Sir John Leach, that, where there is a limitation by will to one for life, and, after his decease, then to the next of kin of the testator, those who are to take under the designation 'next of kin' are the persons who answer that description at the death of the testator, and not those who answer the description at the death of the tenant for life. . . . . The vesting takes place immediately on the death of the testator, but, during the interval between that event and the period fixed for distribution, the

(1) (1858) 4 K. & J. 483. (2) 4 K. & J. 488, 497.

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shares so vested are liable to be divested, as regards the quantum of interest, in proportion as new individuals are introduced into the class. . . . . The next rule . . . . is, that the mere circumstance that the person to whom such previous life interest is bequeathed . . . . is also a member of the class who answered to the description of next of kin . . . . at the . . . . testator's death, does not prevent the first rule from applying. Where the person to whom such previous life interest is bequeathed . . . . is the only individual so answering to that description, the authorities have not been quite so clear as to the construction to be put upon the gift over. . . . . The operation of the rule . . . . which fixes the death of the testator as the time . . . . is not excluded by the mere circumstance that words of futurity are used, ... but . . . . the application of that rule is excluded, where, after a previous bequest for life or other limited interest, there is a bequest 'to those who *then* shall be' the next of kin of the testator, although it would seem, according to Mr. Justice Le Blanc (1), that in the case last supposed, if the ulterior bequest, instead of being, as there, 'to those who then shall be the next of kin,' were 'to those who then shall appear to be his next of kin, in such parts and proportions as they would by virtue of the Statutes of Distribution have been entitled to his personal estate if he had died intestate,' the rule would again become applicable, and the death of the testator would be the period for ascertaining the persons to take under that designation. The words with which I have to deal in the case before me are not those put by

(1) "The question is, To what period the inquiry should refer? Now even if the word *then* had been inserted in the place where it is contended that it must be implied, I am not clear that the clause would not still have been in favour of the plaintiff: for though the distribution had been directed to be made amongst such persons as should '*then* appear,' &c., it would refer as well to the time *when* the inquiry was to be made, that is, when it became necessary to make the inquiry upon the happening of the contingency on which the limitation over was to take effect: but still the inquiry being directed to be made of such persons *as would by virtue of the Statute of Distributions have been entitled to the testator's personal estate if he had died intestate*, that must refer to the time of his death": per Le Blanc J. in *Doe* v. *Lawson*, (1803) 3 East, 278, 293.

Mr. Justice Le Blanc." There is, therefore, a difficulty when there are two periods, that of vesting and that of distribution, and the clause refers to the latter, because it may then be necessary to determine whether or not what is meant is that the persons to take are those who, by reason of devolution, represent the class fixed at the testator's death. In *Bullock* v. *Downes* (1) the gift was, after the son's decease, in case there should not be any child of the son "then to stand possessed of the same, in trust for such person or persons of the blood of me, as would, by virtue of the Statutes of Distribution of Intestates' Effects, have become and been then entitled thereto in case I had died intestate." The testator had a son (who enjoyed the income during life and died without having had a child) and four daughters, and it was held that on the son's death the property was divisible into five shares, of which his personal representatives took one. But we have been unable to find a case like the present one, where, after the gift to the tenant for life, there have been interposed gifts which might take effect and continue for a considerable time after his death, although in *Bullock* v. *Downes* (1) Lord Cranworth says (2): "It is impossible to say that the language of a will may not be such as to shew that persons answering the description of next of kin according to the statute at some time other than that of the testator's death, may have been those intended to take."

In *Mortimer* v. *Slater* (3), affirmed by the House of Lords as *Mortimore* v. *Mortimore* (4), testator gave a fourth of a fund to each of his four daughters by name, and after her death to her children then living, but if she left no child the income was to go to the survivors or survivor of the daughters, and the testator directed that after the death of the last survivor the fourth share was to be divided among her children, "or if there be no such children, that the same be paid to such person or persons as will then be entitled to receive the same as my next of kin under the Statutes for the Distribution of Intestates' Estates." All the daughters survived the testator. One died in the following year, leaving children. The other three all died childless subsequently, and

(1) (1860) 9 H. L. C. 1.
(2) Ibid. 18.
(3) (1877) 7 Ch. D. 322.
(4) (1879) 4 App. Cas. 448, 451.

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at the death of the last of them there was a child living of the one who died first; and it was held that the class was to be ascertained at the testator's death, and that the shares of the daughters who died without issue were divisible in fourths among the persons representing the four daughters.

In the same case, as *Mortimore* v. *Mortimore* (1), in the House of Lords, Lord Cairns L.C., after pointing out the resemblance of the case to *Bullock* v. *Downes* (2), and that apart from that case his conclusion would have been the same, says that the class described as "my next of kin under the Statute for the Distribution of Intestates' Estates" is "a class which, according to the statute, must be ascertained at the death of the testator, and . . . . is not an artificial class of next of kin to be created. The only other words are 'that the same be paid to such person or persons as will *then* be entitled to receive the same.' Now, I am quite willing to look at the word 'then' as if it meant at the expiration of the preceding limitation, but then what does this amount to? Why this. At the expiration of the preceding limitation you are to find out the hands into which you are to pay the money, but you must do that by first ascertaining who were his next of kin at the time of his death."

That is the principle to be applied here. You have not got the class determined at the testator's death, so you must look for another class to be ascertained at the death of the tenant for life, and then you must find the hands which are to receive the fund.

That that is the rule is shewn by *Sturge and Great Western Ry. Co.* (3), in which Hall V.-C. held that where a testator gives property in trust for the benefit of persons who at a time subsequent to his own death shall by virtue of the Statutes of Distribution be his next of kin, the class is an artificial one, to be ascertained on the hypothesis that the testator lives up to and dies at the subsequent period of time. In that case, after gifts to children for their respective lives and after their deaths in favour of their issue, the testator directed that in default the property should be held "upon trust for the person or persons

(1) 4 App. Cas. 448, 451. (2) 9 H. L. C. 1.
(3) 19 Ch. D. 444.

who at the time of such respective decease of my children shall by virtue of the Statutes for the Distribution of the Estates of Persons dying intestate be my next of kin." One of the seven children died a spinster after her father's death, and another daughter died between the deaths of her father and the sister already mentioned, leaving children who survived that daughter. The next of kin of the father at his death were his seven children, but those who were held to take were the five ultimately surviving children and the children of the deceased man's daughter. The words in that case are very similar to those now before the Court. Where there are provisions which prevent the estate vesting in possession, "entitled to" has no meaning except as referring to persons who are going to create the class which may ultimately become entitled. The decision in that case is strongly in our favour.

[PARKER J. I think Hall V.-C. means to distinguish the case before him from the former cases by the particular words used. Referring to *Bullock* v. *Downes* (1) and *Mortimer* v. *Slater* (2), he says (3): "I have to observe that the decisions depended upon the particular expressions used with respect to 'such persons as will then be entitled.' That is what James L.J. laid hold of at once in the latter case; and he asked in effect, 'How do you shew that you are entitled under the description?'" That is to say, "How do you shew that you are entitled under the Statutes of Distribution?" Then he proceeds to say that the case before him is different, because the gift is not to the persons "who shall be entitled under the statute," but to the persons who shall by virtue of the statute "be my next of kin," at a particular time, who are an artificial class.]

As Lord Cairns points out in *Mortimore* v. *Mortimore* (4), you have the class ascertained at the testator's death, but on the tenant for life's death you ascertain who are the persons to give a receipt for the money, the persons entitled to receive it, and they are not necessarily the same persons.

[PARKER J. In *Sturge and Great Western Ry. Co.* (5) Hall V.-C.

(1) 9 H. L. C. 1.
(2) 7 Ch. D. 322.
(3) 19 Ch. D. 449.
(4) 4 App. Cas. 448.
(5) 19 Ch. D. 444.

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does not rely on the facts that the time indicated was the death of the tenants for life and that there might be trusts existing after their deaths.]

He put the case on another ground, but here you take first the class at the testator's death. But the will shews that that is not the class which is to take years afterwards, but that the class to take is to be ascertained at a later date, that of the death of the tenant for life. There is no case requiring the Court to come to a different conclusion. The fact that the tenant for life was the sole next of kin of the testator at the time of his death is a circumstance which cannot be overlooked, for the testator might easily have said, "On failure of issue I give this to the executors and administrators of my said nephew."

Romer, K.C., and *Christopher James*, for the legal personal representatives of Samuel Eyres Wilson. In *Wharton* v. *Barker* (1) Page Wood V.-C. says: "I have already observed, that, where the person to whom the previous life estate is bequeathed is the sole individual answering to the description of next of kin of the testator at the time of his death, the authorities have not been so uniformly consistent as to the effect of that circumstance upon the application of the rule which fixes the time of the testator's death as the time when the class is to be ascertained. But at the present day I should be bound, by the decision of Lord Cottenham in *Ware* v. *Rowland* (2), to hold that even in such a case the rule would apply." The persons for whom we appear are entitled to the fund as being the executors of the sole next of kin of the testator at the time of his death. The question is not at what period the class is to be ascertained. The plaintiffs are not a class ascertained either at the death of the testator or at the period of distribution. They are not persons who can by any possibility be entitled under the Statutes of Distribution, and they are asking the Court to substitute for the words of the will the words "in trust for such persons as would upon the death of the tenant for life have become entitled thereto as my next of kin under the Statutes of Distribution had I then died intestate." There are certainly not in this will the very plain words which are required to take the

(1) 4 K. & J. 483, 498. (2) (1847) 2 Ph. 635.

case out of the general rule that the date of the testator's death is the time for ascertaining the class. In *Cusack* v. *Rood* (1) Jessel M.R. says: "It has been settled by authority that a gift to a person who may be even the testator's sole next of kin, and after his decease to the testator's next of kin, or to the persons who shall be then his next of kin, is a gift to the person or persons who, at the death of the testator, fill the character of next of kin. Of course you may have a contrary intention expressed in the will, but this expression must be clear and unambiguous." In *Wharton* v. *Barker* (2) the gift after the death of daughters without issue was as to one moiety to "the person or persons that shall then be considered as my next of kin and personal representative or representatives agreeable to the order of the Statutes of Distribution." The class can be ascertained at any time; but here the difficulty is to find someone entitled under the statutes. In *Doe* v. *Lawson* (3), where there was a gift to a nephew for life and after his decease "for and amongst such person and persons, and to his and their several and respective heirs, ... as shall appear and can be proved to be my next of kin, in such parts and proportions as they would by virtue of the Statute of Distributions have been entitled to my personal estate if I had died intestate," the Court of King's Bench held that the distribution was to be made amongst those who were the testator's next of kin at the time of his death, though the nephew was one of them. In *Wharton* v. *Barker* (2) the word "entitled" did not occur.

In *Mortimer* v. *Slater* (4) James L.J. says: "The words are, 'the same shall be paid to such persons as will then be entitled,' that is, to the persons to whom the law would give it. The expression does not denote the persons to whom the law under certain contingencies would give the title, but the persons who can allege themselves to be entitled under the statute." At the death of the testator and at the time of his own death the nephew was a person entitled under the statute. The plaintiffs say that there is some period when the class must be taken to have increased.

(1) (1876) 24 W. R. 391.
(2) 4 K. & J. 483.
(3) 3 East, 278.
(4) 7 Ch. D. 322, 327.

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[PARKER J. If the plaintiffs were members of a class who could come in on an inquiry, following the exact words used in the will, there would be less difficulty; but they are asking me to read the words used as pointing to an artificial class, to be ascertained, not only at a certain date, but in a certain contingency. As I understand *Wharton* v. *Barker* (1), *Mortimer* v. *Slater* (2), and *Sturge and Great Western Ry. Co.* (3), all the judges consider "shall be entitled by virtue of the statute" as settling the question.]

The plaintiffs are asking the Court to give the fund to a class which is not necessarily ascertained at the period of distribution, which would be a capricious distribution.

In *Sturge and Great Western Ry. Co.* (3) Hall V.-C. was driven to his decision by the words of the will, but this will does not require a departure from the general rule. It would be curious if the class had to be ascertained at the death of the nephew when the fund might not be distributed till thirty years afterwards.

Buckmaster, *K.C.*, in reply, referred to *In re Morley's Trusts.* (4)

Cozens-Hardy, for the trustee of William Wilson.

PARKER J. The question which arises in the present case is, What is the true construction of a will which, after giving a life interest to Samuel Eyres Wilson, a nephew of the testator, and certain contingent interests to his children and issue, proceeds as follows? [His Lordship read the remaining words of the will, and continued:—] The question is one which has often arisen, and relates to the period at which the class to take under the gift in favour of next of kin is to be ascertained. In other words, does the testator indicate his next of kin at the date of his death, or an artificial class to be ascertained at another period, in this case the death of his nephew?

Mr. Buckmaster, whose argument I think has considerable force, having regard to the authorities on the subject, contends that in construing wills of this sort it is material to consider whether

(1) 4 K. & J. 483.
(2) 7 Ch. D. 322, 327.
(3) 19 Ch. D. 444.
(4) (1877) 25 W. R. 825.

the time suggested for the ascertainment of the class is or is not coincident with the real period of distribution. If you have ambiguous words, and it is contended that the testator meant his next of kin at the date of his death, the obvious criticism is: "If he meant that, why did he not say so?" But you displace that criticism if you can suppose that when the testator uses those ambiguous words he is merely referring to the difference between the class who take vested interests, namely, the next of kin at his death and the class of persons who will actually receive the property at the time of distribution, and that that accounts for his not making the ultimate gift simpliciter to his next of kin.

In the present case, it is said, this explanation is not available, because, curiously enough, the time which the testator specifies—namely, "the death of my nephew Samuel Eyres Wilson"—although it may be, will not necessarily be, the actual time when the fund becomes distributable, inasmuch as there are trusts in favour of Samuel Eyres Wilson's issue which may become operative at his death, and extend over a considerable period beyond his death. Mr. Buckmaster distinguishes the case I have to deal with from other cases in the books because of that peculiarity. He contends that you cannot, as in those cases, say that the testator was merely referring to the difference between the persons originally entitled and the persons actually entitled to receive the fund when the period of distribution arrived because the period referred to—namely, the death of Samuel Eyres Wilson—is not necessarily the period of distribution.

After carefully examining the reported cases, I have come to the conclusion that I am bound by those cases to decide against Mr. Buckmaster's contention, and to hold that the class to take are the next of kin at the testator's death. My reason for so holding is the existence of the particular words "in trust for such person or persons as on the death of Samuel Eyres Wilson will be entitled to as my next of kin under the Statutes for the Distribution of Intestates' Estates." There is obviously an omission after the word "to" of some such words as "the same" or "receive the same," or possibly the word "to" ought to have been left out.

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In order that anybody can come within this class he must be able at the period of distribution to come forward and say: "I am or represent a person who on the death of Samuel Eyres Wilson was entitled as one of the next of kin of the testator under the Statutes for the Distribution of Intestates' Estates."

Words like these have been relied upon in several of the most important of the cases which have been cited. In *Wharton* v. *Barker* (1) Page Wood V.-C., after discussing the previous cases, including *Doe* v. *Lawson* (2), says: "The words with which I have to deal in the case before me are not those put by Mr. Justice Le Blanc. In this will the word 'entitled' does not occur in connection with the mention made of the Statute of Distributions, and the bequest is simply to those 'who shall then be considered the next of kin and personal representative or representatives agreeable to the order of the Statutes of Distribution." The words of Le Blanc J., to which the Vice-Chancellor refers (3), are that the inquiry to be directed to be made must be "of such persons as would by virtue of the Statute of Distributions have been entitled to the testator's personal estate if he had died intestate."

Similarly I find that in *Mortimer* v. *Slater* (4) James L.J. makes the same distinction between cases where the words "entitled under the statute" occur and cases in which those words are not used. He says: "The words are, 'the same shall be paid to such persons as will then be entitled,' that is, to the persons to whom the law would give it. The expression does not denote the persons to whom the law under certain contingencies would give the title, but the persons who can allege themselves to be entitled under the statute. That was the *ratio decidendi* in *Bullock* v. *Downes*. (5) It appears to me to be plain that to satisfy that expression you must have a person who can shew a title under the Statute of Distributions, and the only persons who can shew a title under the Statute of Distributions are the persons who were next of kin at the death of the

(1) 4 K. & J. 483, 498.
(2) 3 East, 278.
(3) 4 K. & J. 497.
(4) 7 Ch. D. 322, 327.
(5) 9 H. L. C. 1.

testator (who was partially intestate) or the persons who represent them."

Lastly, when one comes to *Sturge and Great Western Ry. Co.* (1), which is the only case mentioned to-day, so far as I can make out, where the peculiarity on which Mr. Buckmaster lays so much stress occurs, that is to say, where the apparent date for the ascertainment of the class is not the period of distribution, one finds that Hall V.-C. draws the same distinction with reference to the case where the words are "entitled under the statute" and the other cases, for he says: "With regard to the authorities which have been referred to, *Bullock* v. *Downes* (2), *Mortimer* v. *Slater* (3), and more particularly with regard to James L.J.'s judgment in *Mortimer* v. *Slater* (3), I have to observe that the decisions depended upon the particular expressions used with respect to 'such persons as will then be entitled.' That is what James L.J. laid hold of at once in the latter case; and he asked, in effect, 'How do you shew that you are entitled under the description?' In order to satisfy the description you must be a person who can shew a title under the statute, and the only persons who can do that are the next of kin of the testator at his death; and he rested the case upon no other ground than that."

I do not think that the House of Lords, when the same case, under the name of *Mortimore* v. *Mortimore* (4), came before it, rested the case on that ground solely, because Lord Cairns rather relied on the words "to receive" and on the point which Mr. Buckmaster has made, namely, that the testator in that case was thinking of the time of distribution and the persons who would then be entitled to receive the fund. None the less we have James L.J. following Page Wood V.-C. and Hall V.-C., both laying stress upon the particular words which we have in the present case. That being so, I think I am entitled to say that Hall V.-C., had *Sturge and Great Western Ry. Co.* (1) been a case in which the gift was to such persons as would at the period in question have been entitled under the statute, would

(1) 19 Ch. D. 444, 449.
(2) 9 H. L. C. 1.
(3) 7 Ch. D. 322, 327.
(4) 4 App. Cas. 448.

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have come to the same conclusion as was come to in the earlier cases, and would not have decided that case in the way he did.

Having regard, therefore, to the authorities to which I have referred, whatever may be the force of Mr. Buckmaster's argument—which no doubt will be open to him in the Court of Appeal if this case comes to be considered there—I do not think I should be right in yielding to that argument and ignoring what was said in the earlier authorities.

I have come to the conclusion, having regard to the use of the express words "will be entitled as my next of kin under the statute," that no one will be entitled who cannot say: "I am or represent a person who at the death of Samuel Eyres Wilson was entitled as one of the next of kin of the testator by virtue of the statutes."

Solicitors for plaintiffs: *Peacock & Goddard, for Younge, Wilson & Co., Sheffield.*

Solicitor for defendants: *J. W. Alton Batchelor.*

F. E.

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Feb. 13, 14, 21.

In re GIBBS.
MARTIN *v.* HARDING.

[1906 G. 2349.]

Will—Construction—"Residuary Legatee"—Real Estate—Specific Disposition of Entirety at Date of Will—Subsequent acquisition of further Real Estate—Intestacy—Extrinsic Evidence.

Testatrix, by her will dated in 1891, after giving a pecuniary legacy "free of income tax," and specifically disposing of certain real estate "free of legacy duty," "bequeathed" a freehold cottage to E. J. H. She then directed that all her household furniture and other chattels should be sold, reserving the right to E. J. H. to retain any special articles she might wish for, "all else to be sold." Then, after disposing of her jewellery, she concluded, "I leave the aforesaid E. J. H. my residuary legatee." All the real estate which she possessed at the date of her will was thereby specifically disposed of. She died in 1903, having in the meantime purchased other real estate:—

Held, that in considering whether the naming of a "residuary legatee" constituted a residuary devise, the fact that at the date of the will the testatrix possessed no real estate other than that specifically and completely disposed of must be borne in mind; but that there was not sufficient context in this will to modify the prima facie meaning of the term "residuary legatee"; and, consequently, that the subsequently acquired real estate did not pass to E. J. H., but was undisposed of by the will.

The testatrix H. L. Gibbs, by her will dated March 25, 1891, gave and bequeathed to her niece Ann James and to her niece Mary Elizabeth James 300*l.* "free of income tax" to be equally divided between them. She further gave to them certain cottages in Stratford-on-Avon "with power to sell or otherwise as they may agree also free of legacy duty." Then, after making various specific bequests of furniture and giving certain pecuniary legacies, she continued: "And to my dear friend Emily Jane Harding of Elm Street Stratford on Avon I bequeath my freehold property known as The Cottage Old Town Stratford on Avon with stabling coachhouse garden &c. in short all appertaining to the same. At this date March 25th 1891 there is four hundred pounds remaining on mortgage of property in Wood Street belonging to and in the occupation of

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Mr. William Shakespeare (Stratford on Avon) this I direct to be called in. Also a mortgage of three hundred pounds granted to the late William Barnes-Eaves by the late James Ward. This I have received notice of repayment on or before the 27th of April next 1891 out of the above sums I direct that the mortgage of five hundred pounds due to Mr. John James Nason on my property The Cottage Old Town Stratford on Avon be paid off and the deeds handed over to the aforesaid Emily Jane Harding. Further I desire that all my household furniture ornaments glass china pictures and other chattels (reserving the right to the aforesaid Emily Jane Harding to retain any special articles she may wish for) may be sold either privately or by auction curiosities also. My dear father's portrait I wish given to Ann James aforesaid and the plate marked AAB. The salt cellars so marked I give to Emily Jane Harding. All else to be sold." Then, after disposing of certain articles of jewellery, she continued: "I leave the aforesaid Emily Jane Harding my residuary legatee and executrix and I appoint Charles E. Martin as executor with Emily Jane Harding. All monies belonging to me at the time of my decease I desire to be paid in to my executrix and executor and all my just debts discharged."

The testatrix did not by her will specifically dispose of a freehold messuage known as 18, Old Town, Stratford-on-Avon, to which at the time of her decease she was entitled in fee simple, but which she had purchased after the date of her will. At the date of her will she had no real estate other than that which was thereby specifically disposed of. She died on January 19, 1903. This summons was taken out by C. E. Martin to determine the question whether, according to the true construction of the will, the freehold messuage known as 18, Old Town, Stratford-on-Avon, passed thereunder to Emily Jane Harding as residuary legatee.

There being some difficulty in ascertaining who was the heir-at-law, the defendant Brind was, by the direction of the Court, added as a defendant to represent the heir-at-law.

T. T. Methold, for the plaintiff.

Maugham, for E. J. Harding. On the whole will there is sufficient context to enable the Court to construe the expression

"residuary legatee" as applying to real estate. The testatrix, in disposing of her real estate, uses words which are applicable to personal estate. Moreover, there is a direction to sell. The words "all else to be sold" are not referable to the chattels only: *Singleton* v. *Tomlinson* (1); *Hughes* v. *Pritchard.* (2) *In re Methuen and Blore's Contract* (3) is distinguishable, inasmuch as there was there no direction for sale. In *Evans* v. *Crosbie* (4) there was less context than in the present case, and yet the words were held to pass real estate.

Beebee, for the defendant Brind. "Residuary legatee" cannot be construed as meaning "residuary devisee" unless the context is very clear: *In re Methuen and Blore's Contract.* (3) The Court will not admit extrinsic evidence as to the condition of the property at the date of the will in order to contradict the plain meaning of the language used in the will: *Higgins* v. *Dawson.* (5) The words "all else to be sold," having regard to their position in the will, cannot refer to anything but the chattels. It is said that the testatrix, in disposing of her real estate, only used words applicable to personalty, and that therefore the expression "residuary legatee" occurring in another part of the will ought to be construed as "residuary devisee." *In re Morris* (6) was a somewhat similar case, and yet the undisposed of real estate was there held not to pass to the "residuary legatee."

Maugham, in reply. In *In re Morris* (6) there was no such inapt use of language as in this case. In *In re Methuen and Blore's Contract* (3) Jessel M.R. expressly relied upon the fact that there was no gift of real estate, and indicated that if it had been otherwise he would have held "residuary legatee" to mean "residuary devisee." That case is different from the present. On construction the direction "all else to be sold" is a perfectly general phrase, and cannot be cut down as applying only to the chattels. In so loosely drawn a will the position of that direction ought not to be regarded as important. For the purpose of construction the Court will have regard to the state of the property at the date of the will.

(1) (1878) 3 App. Cas. 404.
(2) (1877) 6 Ch. D. 24.
(3) (1881) 16 Ch. D. 696.
(4) (1847) 15 Sim. 600.
(5) [1902] A. C. 1.
(6) (1894) 71 L. T. 179.

JOYCE J. 1907 GIBBS, *In re.* MARTIN *v.* HARDING.

Feb. 21. JOYCE J. The question in this case is whether in this will the designation of Emily Jane Harding as residuary legatee and executrix constitutes a residuary devise so as to pass certain freehold property which was not acquired by the testatrix until some time after she made her will, and is not otherwise disposed of thereby. It has been observed that the will is loosely and incorrectly drawn. The testatrix gives and bequeaths to two nieces a pecuniary legacy "free of income tax." She gives freehold cottages "free from legacy duty," and, as in *In re Morris* (1), which has some points of similarity with the present case, the testatrix "bequeaths" other freehold property. The word "bequeath," however, though more correctly applied to personal estate, is not strictly so limited. It does not follow from its being used by this testatrix in disposing of real estate that when she names her "residuary legatee" she meant thereby "residuary devisee" or "residuary legatee and devisee."

It is well settled that the words "residuary legatee" by themselves prima facie do not apply to real estate, though their application may be extended so as to do so when the context requires it, and when a testator directs his real estate to be sold and disposes of part of the proceeds, it may be taken, I think, that the appointment of a residuary legatee will pass the rest. The phrase "all else to be sold," however, in this will, having regard to the position in which it occurs, cannot, I think, be fairly considered to have any application to real estate, but only to furniture and chattels, especially as the real estate of the testatrix is all of it specifically disposed of by preceding clauses.

It may be arguable that when a testator after specific dispositions of parts of his real estate appoints a residuary legatee, such legatee will take the residue of his real estate; but if this argument ought to be allowed to prevail in such a simple case, I think there is a material difference where the will contains specific dispositions of all the real estate, and the person named as residuary legatee is one of the specific devisees. In the present case she is the person who takes under the last specific devise in the will. No doubt *Higgins* v. *Dawson* (2) decides that the condition of a testator's assets ought not to be gone into and

(1) 71 L. T. 179. (2) [1902] A. C. 1.

considered for the purpose of altering the meaning of language in itself perfectly clear and well applicable to definite objects in the condition of things to which the will refers. But, as Lord Cairns says in *Charter* v. *Charter* (1), "The Court has a right to ascertain all the facts which were known to the testator at the time he made his will, and thus to place itself in the testator's position, in order to ascertain the bearing and application of the language which he uses, and in order to ascertain whether there exists any person or thing to which the whole description given in the will can be, reasonably and with sufficient certainty, applied": see also per Lord Blackburn in *River Weir Commissioners* v. *Adamson*. (2) Accordingly I think the fact that at the date of the will this testatrix had no real estate other than that of which the will contains specific and complete dispositions may be and must be borne in mind in considering whether the naming of a residuary legatee constitutes a residuary devise. The prima facie and regular meaning of the term "residuary legatee" is the person taking what the law calls the residue of the personal property. It would be unsafe, and might throw doubt upon titles, if the Court were to depart from the plain and settled meaning of the term upon grounds not clearly sufficient, and when it is not abundantly clear that the will was intended by the testatrix to pass the real property concerning which the question arises. In the present case I think that there is not sufficient context to modify the prima facie meaning of the term residuary legatee, and I hold the subsequently acquired real estate to be undisposed of by the will.

Solicitors: *Rawle, Johnstone & Co., for Slatter, Son & Gibbs, Stratford-upon-Avon.*

(1) (1874) L. R. 7 H. L. 364, 377. (2) (1877) 2 App. Cas. 743, 763.

G. A. S.

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Feb. 20, 27 28; *March* 9.

In re COUTURIER.

COUTURIER *v.* SHEA.

[1906 C. 3806.]

Will—Legacy—Direction to set apart and pay by Instalments on Legatee's attaining specified Ages—No Gift over—Postponement of Payment—Vesting—Intermediate Income.

Testatrix desired and directed to set apart the sum of 200*l.* for her grandson J. W. L. S., the sum of 150*l.* for her grandson J. V. S., and the sum of 150*l.* for her grandson F. D. S., the said sums to be free of duty and to be paid respectively as to 50*l.*, part thereof, on their attaining the age of twenty-one years, and as to 50*l.*, part thereof, on their attaining the age of twenty-five years, and she directed that the balance 100*l.* for her grandson J. W. L. S. be paid him on his attaining the age of thirty years, and the balances 50*l.* for J. V. S. and F. D. S. be paid them on their respectively attaining the age of thirty years. There was no disposition of the intermediate income, or gift over of the principal.

J. W. L. S. survived the testatrix, and on attaining twenty-one the first-mentioned sum of 50*l.* was paid to him, but he died before attaining twenty-five:—

Held, that each bequest was equivalent to a gift of a legacy to the particular legatee, payable as to part at twenty-one, further part at twenty-five, and the balance at thirty; and that each legatee upon attaining twenty-one was entitled to the payment of his legacy and the intermediate interest or income, and that the legal personal representative of any legatee who survived the testatrix and died before actual payment was entitled to the legacy or balance unpaid of both principal and income.

Gosling v. *Gosling*, (1859) Joh. 265, applied.

Adjourned Summons.

By her will dated May 30, 1903, Amelia Couturier, the testatrix, appointed the plaintiffs her executors, and provided as follows: "I desire and direct also to set apart the sum of 200*l.* for my grandson James William Louis Shea also to set apart the sum of 150*l.* for my grandson John Victor Shea and also set apart the sum of 150*l.* for my grandson Frederick David Shea these said sums to be free of duty and to be paid respectively as to 50*l.* part thereof on their attaining the ages of

twenty-one years and as to 50*l.* part thereof on their attaining the ages of twenty-five years and I direct that the balance 100*l.* for my grandson James William Louis Shea be paid him on his attaining the age of thirty years and also the balance 50*l.* for my grandson John Victor Shea to be paid him on his attaining the age of thirty years and also the balance 50*l.* for my grandson Frederick David Shea to be paid him on his attaining the age of thirty years." There was no gift over in the event of the legatees dying before the period fixed for payment.

The testatrix died, and her will was proved by the plaintiffs on December 11, 1903.

James William Louis Shea survived the testatrix and attained the age of twenty-one years, and the first-mentioned sum of 50*l.* was paid to him, but he died on May 12, 1905, a few days before he would have attained the age of twenty-five years, a bachelor and intestate, and letters of administration of his estate had been granted to his mother, the defendant Frances Amelia Shea.

The plaintiffs took out this summons for the determination, inter alia, of the question whether the legacy of 200*l.* set apart for J. W. L. Shea failed as to the balance, or whether such balance was now, or would at some future date be, payable to the defendant F. A. Shea as his administratrix, and whether with any and, if so, what interest.

Austen-Cartmell, for the plaintiffs. In cases of this nature the question is whether there is a gift with a superadded direction to pay at a given time, or whether the only gift is in the direction to pay. There is no gift in this will except in the direction to pay at a certain age, and the gift is contingent upon the legatee attaining that age: per Knight Bruce V.-C. in *Williams* v. *Clark*. (1) Where the gift is once vested then, notwithstanding a direction to pay at twenty-five, the legatee is entitled to payment at twenty-one: *Rocke* v. *Rocke*. (2)

The fact that there is a complete separation or setting apart of the legacy for the benefit of the object of the gift and the absence of any gift over are in favour of the vesting of the legacy:

(1) (1851) 4 De G. & Sm. 472. (2) (1845) 9 Beav. 66.

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Saunders v. *Vautier* (1); *In re Wrey* (2); *In re Bevan's Trusts* (3); *Dundas* v. *Wolfe Murray* (4); *Love* v. *L'Estrange.* (5)

If the Court is of opinion that the legacy is vested and only payment postponed, the question arises whether it carries the intermediate income. The general rule is that a legacy payable at a future day, whether vested or not, carries interest only from the time fixed for payment: *Tyrrell* v. *Tyrrell* (6); but where the fund is severed, as in this case, it will carry the intermediate income: *Dundas* v. *Wolfe Murray* (4); *Acherley* v. *Wheeler.* (7)

Woodfin, for the defendant F. A. Shea. The language of the will and the cases cited all go to shew that the legacy was vested, and the balance unpaid, together with the intermediate income, is now payable to the legatee's administratrix.

Ward Coldridge, for other defendants not interested in this gift.

Cur. adv. vult.

March 9. JOYCE J., after reading the directions in the will above set out, continued:—The question is when did each of these several legacies vest in the legatee—in other words, whether the gift of the sum directed to be paid to the legatee upon his attaining a particular age is contingent upon such age being attained, or will pass to the legal personal representative of a legatee who died before the date for payment.

There is no express direction as to the period of vesting. The general rule where the will or other instrument is silent as to the period of vesting is that the gift is vested immediately on the donee coming into existence or on the instrument coming into operation (whichever last happens), if the enjoyment is postponed merely for the convenience of the estate or to allow of an intervening or other limited interest, but if the postponement of enjoyment is for reasons personal to the donee, the gift will be contingent. But in determining the period of vesting it is always considered a material circumstance if the legacy be severed from the rest of the estate. Here there is no express

(1) (1841) Cr. & P. 240.
(2) (1885) 30 Ch. D. 507.
(3) (1887) 34 Ch. D. 716.
(4) (1863) 1 H. & M. 425.
(5) (1727) 5 Bro. P. C. 59.
(6) (1798) 4 Ves. 1.
(7) (1721) 1 P. Wms. 782.

direction as to the interest or income of the legacy, but in each case the legacy was not merely severed from the rest of the estate, but was directed to be set apart for the legatee and to be free of duty.

Where a legacy is directed to be set apart for the legatee without more, that, in my opinion, is sufficient to carry the income from the date of the setting apart unless a contrary intention appears by the will. So that here the legacy, with interest, is for the legatee, subject to the directions following with respect to the mode or times of payment. If these directions as to the periods of payment were absent there would still, I think, be sufficient left to give an immediately vested legacy, with the interest or income thereof.

What effect is to be given to the directions with respect to payment? A legacy to A. upon attaining a given age is contingent upon the attainment of that age by the legatee, but a legacy to A. payable at a given age is a present gift and vests at once, the payment only being postponed; so that if the legatee dies before the age prescribed for payment his legal personal representative will be entitled.

A simple bequest of a legacy to A., with an added direction to accumulate until A. attains a given age, say twenty-five, and an express direction to postpone payment until then, vests immediately, and the legatee upon attaining twenty-one is entitled to payment. In *Gosling* v. *Gosling* (1) Wood V.-C. thus states the law: "The principle of this Court has always been, to recognise the right of all persons who attain the age of twenty-one to enter upon the absolute use and enjoyment of the property given to them by a will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age:—unless, during the interval, the property is given for the benefit of another. If the property is once theirs, it is useless for the testator to attempt to impose any fetter upon their enjoyment of it in full so soon as they attain twenty-one. And upon that principle, unless there is in the will, or in some codicil to it, a clear indication of an intention on the part of the testator, not only that his devisees are not to have the enjoyment of the property

(1) Joh. 265, 272.

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he has devised to them until they attain twenty-five, but that some other person is to have that enjoyment,—or unless the property is so clearly taken away from the devisees up to the time of their attaining twenty-five as to induce the Court to hold, that, as to the previous rents and profits, there has been an intestacy—the Court does not hesitate to strike out of the will any direction that the devisees shall not enjoy it in full until they attain the age of twenty-five years."

Here there is no express direction to accumulate or as to interest; but, as I have already observed, a direction to set apart for the benefit of A., the income not being otherwise disposed of, in my opinion implies that A. is to have the income as well as the principal from the time of setting apart or from the time when the setting apart is directed to take place. There is here no gift over or other express disposition of the principal in the event of the legatee dying before the period fixed for payment. Upon the whole I consider these bequests equivalent to a gift of a legacy to the legatee payable as to part at twenty-one, further part at twenty-five, and the balance at thirty. According to the principle of the decision in *Gosling* v. *Gosling* (1), I am, therefore, of opinion that each of these legatees upon attaining twenty-one is entitled to the payment of his legacy with the intermediate interest or income, and that the legal personal representative of any legatee who survived the testatrix and died before actual payment is entitled to the legacy or balance remaining unpaid of both income and principal.

Solicitors: *G. Aplin Nichols; W. B. Glasier.*

(1) Joh. 265.

R. M.

In re BACON.
TOOVEY *v.* TURNER.

[1906 B. 1778.]

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1907

Jan. 31 ; *Feb.* 6.

Will—Construction—Power of Sale—Power given to "my Trustees"—Power exercisable by Survivor—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 5—*Reversionary Interest in Land—Woman married before the Act—Conversion into Money before coming into Possession—Accruer of Title.*

In a will executed before any of the Acts giving statutory power to trustees, when a power of sale is given to trustees by name or under the description "my trustees," to whom the legal estate is devised, the power can be exercised by the surviving trustees or the sole surviving trustee. The contrary rule never applied except to a bare power.

If a woman married before the commencement of the Married Women's Property Act, 1882, has before the commencement of the Act acquired a title in reversion to land, and the land is converted into money after the commencement of the Act but before the property falls into possession, the conversion gives no new title to the married woman, and the property is not made her separate estate by s. 5, sub-s. 1, of the Act.

Samuel Bacon, by his will dated August 19, 1856, devised and bequeathed his real estate and the residue of his personal estate unto and to the use of his wife and two other trustees, their heirs, executors, administrators and assigns respectively, upon trust to permit his wife to receive the yearly produce thereof during her life, and after her death upon trusts which it was admitted by all parties were void for perpetuity; and he gave his trustees the following power: "I empower my said trustees to permit the said real and personal estate to continue in the same state of investment as may be at the time of my decease so long as they shall think fit. And I declare that my trustees shall not by so doing incur any responsibility whatsoever and that they shall and may from time to time sell and dispose of all or any part of my said real and personal estate at their own discretion to alter vary and transpose any of my present or future securities. . . . . I declare that the receipt or receipts in

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writing of my trustees or trustee for the time being for the purchase-money of any of my property sold or for any other monies stocks funds or securities paid or transferred to them or him under or by virtue of this my will or in the execution of any of the trusts thereof shall be an effectual discharge or effectual discharges for such purchase or other monies stocks funds and securities."

The testator died on October 3, 1856, leaving his widow, Elizabeth Bacon, and two children, Henry Bacon and Elizabeth Poole Bacon, surviving. Henry Bacon became entitled, as the testator's heir-at-law, to his real estate, and died in November, 1877, a bachelor and intestate, leaving his sister Elizabeth Poole Bacon his heiress-at-law.

Elizabeth Poole Bacon was married in 1875 to Harry Turner, and died on May 19, 1905, leaving her husband and five children surviving, of whom Reginald Charles Turner, her eldest son and heir-at-law, and three others had attained the age of twenty-one years, and the fifth was an infant. She made a will leaving all her estate in trust for her children.

The two co-trustees of the widow had died in or before 1877, and the widow was left sole trustee.

Elizabeth Bacon, the testator's widow, died on January 14, 1906.

Harry Turner, the husband, survived his wife and the testator's widow, but died before the hearing of this summons.

Part of the testator's estate consisted of freehold houses in London. One of these had been sold by the widow, who was then the sole surviving trustee of the will, in 1901, and the proceeds invested in 1741*l.* 8*s.* 10*d.* West Australian Government Inscribed Stock. In 1904 the eldest son and daughter of Mrs. Turner were appointed trustees of the will, and this stock was transferred into their names.

This summons was taken out by one of the legal personal representatives of the testator, who was one of the executors of his widow and also of Mrs. Turner, for the determination, amongst others, of the questions—

(1.) Whether in the events which had happened the said sum of stock representing the proceeds of sale of real estate belonging

to the testator was to be regarded as from the date of such sale as real or personal estate.

(2.) Whether the said sum of stock formed part of the separate estate of the said Elizabeth Poole Turner and passed under her will or passed at her death to her husband.

It was admitted that the testator had died intestate as to all beneficial interest in his property after the life estate of his widow; and that his real estate descended to his son as heir-at-law and on the son's death to Mrs. Turner as his heiress-at-law. The question was whether the sale by the widow as trustee had effected a conversion.

The first point argued was that the words of the will created a trust for sale, and therefore made an absolute conversion, but the judge held that they gave a power only. The question was then raised whether there had been a valid exercise of the power of sale.

Rawlins, K.C., and *A. à B. Terrell*, for R. C. Turner, the heir-at-law of Mrs. Turner. There was no valid exercise of the power of sale. The testator died before either Lord St. Leonards' Act (22 & 23 Vict. c. 35) or Lord Cranworth's Act (23 & 24 Vict. c. 145), so that the sale cannot be justified under any powers conferred by those Acts. It must depend on the power given by the will. The power is given to three persons, and therefore, until s. 28 of the Conveyancing Act, 1881, was passed, could not be exercised by the single survivor: Farwell on Powers, 2nd ed. pp. 454, 456. In any case it was an improper sale; it is not the business of a trustee to sell so as to change the rights of parties. The widow could, and ought to, have sold as tenant for life.

Micklem, K.C., and *Church*, for the representatives of Mrs. E. P. Turner's husband. The receipt clause proves that the testator had annexed the power to the office of trustee and expected it to be exercised by a single trustee.

Rawlins, K.C., in reply. *Cur. adv. vult.*

Feb. 6. SWINFEN EADY J. The question is whether a sale by the sole surviving trustee was a valid exercise of the power contained in this will. There were three trustees. [His Lordship read

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the power of sale and the receipt clause above set out.] That being so, the question is whether the single surviving trustee could exercise the power of sale. It is contended that, before the Conveyancing Act, where a power was given to two or more trustees and one or more died the power could not be exercised by the survivors or survivor. *Townsend* v. *Wilson* (1) was cited for that proposition. That was a case sent from Chancery for the opinion of a Court of law, in which two surviving trustees out of three exercised a power of sale, and the judgment of the Court, of which Lord Ellenborough was a member, was that the power was not well exercised. In that case the deed expressly provided that the purchase-money should be paid into the hands of the trustees or the survivors or survivor of them. No reasons are given for the judgment, but a certificate was given of the opinion of the Court. That case came before Lord Eldon in *Hall* v. *Dewes* (2), where a vendor had filed a bill for specific performance. His title depended on the validity of the exercise of a power of sale by the two survivors of three trustees. Lord Eldon disagreed with the decision in that case, and said "he believed that he should not have been induced so to decide it," but said he could not compel the purchaser to take the title. It is to be observed that in both the cases to which I have referred the power was a bare power of sale vested in trustees; they took no estate, the legal estate having been conveyed to uses in strict settlement. In *Lane* v. *Debenham* (3), before Page Wood V.-C., the question arose with regard to the exercise of a power of sale, and the Vice-Chancellor pointed out the distinction between a bare power and a power coupled with an interest, and the confusion which had arisen from not observing that distinction. He says: "Mr. Walker has argued, that, whether the case be one of a power or a trust, if it be confided to two persons, or if it be a mere trust for sale, if it be said that the sale is to be made by two persons, a survivor of the two can never execute it. The argument proceeds, as it appears to me, upon an entire disregard of the distinction between powers and trusts. No doubt, where it is a naked power given to two persons, that will not

(1) (1818) 1 B. & Al. 608. (2) (1821) Jac. 189, 193.
(3) (1853) 11 Hare, 188, 191, 195.

survive to one of them, unless there be express words, or a necessary implication upon the whole will, shewing it to be the intention that it should do so. But the ground of that rule is, that, where the testator has disposed of his property in one direction, subject to a power in two or more persons enabling them to divert it in another direction, the property will go as the testator has first directed, unless the persons to whom he has given the power of controlling the disposition exercise that power. He, therefore, to whom the testator has given the property, subject to having it taken from him by the exercise of the power, has a right to say it must be exercised modo et forma. It is therefore a rule of law, that, in all cases of powers, the previous estate is not to be defeated unless the power be exercised in the manner specifically directed. When, on the other hand, a testator gives his property, not to one party subject to a power in others, but to trustees, upon special trusts, with a direction to carry his purposes into effect, it is the duty of the trustees to execute the trust;—thus, if the direction be to raise a certain sum of money, the estate is thereby at once charged, and it becomes the duty of the trustees to raise the charge so created. If an estate be devised to A. and B. upon trust to sell, and thereby raise such a sum, it is I think a novel argument, that, after A.'s death, B. cannot sell the estate and execute the trust."

The Vice-Chancellor then dealt with one or two other cases, and concluded his judgment: "I think, as I have observed, that the fallacy of the argument on behalf of the defendant is in mixing together the rules applicable to bare powers or authorities, and those applying to interests." In Lewin on Trusts, 11th ed. p. 748, the rule is thus laid down: "It seems to be now decided that even where the trust is reposed in the trustees by name, the survivor, who takes the estate with a duty annexed to it, can execute the trust; and the rule of survivorship applies not only to trusts or powers imperative which are construed as trusts, but also to such discretionary powers as are annexed to the office of trustee, and are meant to form an integral part of it." He refers to *Warburton* v. *Sandys* (1) and *Crawford* v. *Forshaw*. (2) On these grounds, therefore, I am of opinion that the exercise of

(1) (1845) 14 Sim. 622. (2) [1891] 2 Ch. 261.

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power was valid and the sale was a good sale. I think the case is covered by authority.

Marcy (amicus curiæ) referred his Lordship to *In re Smith.* (1)

SWINFEN EADY J. That decision is also in accordance with what I have said.

The second question was then argued.

Rawlins, K.C., and *A. à B. Terrell*, for R. C. Turner. That disposes of R. C. Turner's claim as heir-at-law, but, as one of Mrs. Turner's children, he has an interest in this money if it passed under her will. The sale turned the land into personal estate, and we contend that Mrs. Turner's title to that personal estate first accrued within the meaning of the Married Women's Property Act, 1882, s. 5, at the date of the sale. She has a different and a new title to the property. Before the sale she had a reversion in fee subject to her mother's life interest, and to a possible tenancy by the curtesy in her husband. *Johnson* v. *Johnson* (2) shews that the rents and profits during her life belonged to her, by virtue of the Married Women's Property Act, 1870, for her separate use, but the fee did not. When the property was sold she acquired the capital sum in reversion contingently on her surviving her husband, while he acquired the capital sum in reversion if he survived. *Reid* v. *Reid* (3) is really in our favour. It decides that you must look for the first accruer of title, but it must be the title to the same property. This is a different property with different incidents, as is shewn by the very different rights of the husband.

Eve, K.C., and *Ashton Cross*, for the three other adult children of Mrs. Turner.

Jago, for the infant child.

Micklem, K.C., and *Church*, for the representatives of the husband. The whole point is that the property is the same. It is only by a very strained ingenuity that it can be made out

(1) [1904] 1 Ch. 139. (2) (1887) 35 Ch. D. 345.
(3) (1886) 31 Ch. D 402.

to be a new property. It is the same property held by Mrs. Turner upon the title as heiress-at-law of her brother, which first accrued on his death in 1877.

SWINFEN EADY J. I am of opinion that the argument in favour of Mrs. Turner's children cannot be sustained. The short point is this. In 1877 Mrs. Turner became entitled, as heiress-at-law of her brother, to certain real estate. By virtue of the Married Women's Property Act, 1870, as Mrs. Turner was married after the commencement of that Act, and the property descended upon her as heiress-at-law of an intestate, the rents and profits during her life belonged to her for her separate use, but she had no power to dispose of the fee. Afterwards, in her lifetime, the property was sold by the trustee and converted into personalty. It was argued that her title to the money first accrued on the sale, which was in 1901, after the commencement of the Married Women's Property Act, 1882; and therefore the money belonged to her for her separate use. She died in 1905, and her children claim under her will. In my opinion her title to the property accrued when it descended upon her as heiress-at-law of her brother. She then became entitled to the land, and she has acquired no new property and no new title since. The trustee has converted the land into money, but that did not give her any new title. I am of opinion that her title to the money did not accrue at the date of the sale within the meaning of s. 5 of the Married Women's Property Act, 1882. The result is that on her death the money went to her husband, who survived her, and it passed under his will as personal estate.

Solicitors: *A. Toovey; E. G. Van Tromp; Martin & Watkins; Cridland & Nell.*

J. R. B.

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Feb. 22.

In re ROSS.

WINGFIELD *v.* BLAIR.

[1906 R. 1931A.]

Practice—Administration—Concurrent Actions—Conduct of Proceedings.

The general rule that where there are concurrent actions for administration the conduct of proceedings under an order made in either action will be given to the plaintiff in the action first commenced does not apply where that plaintiff is a creditor whose claim is bona fide disputed.

Charles Ross, the testator, died on September 20, 1906, and on October 25 his will was proved by the sole executor, the defendant in both the actions hereinafter mentioned. The first action for the administration of the testator's estate was commenced by writ on November 15. The plaintiffs Masson & Co. were a firm of French milliners trading in London and Paris. Their claim was for 266*l.* 18*s.*, balance of a bill delivered to the testator in his lifetime for dresses supplied to his wife. 50*l.* had been paid on account during the testator's life. On November 5 Masson & Co. applied to the defendant's solicitors to have this claim admitted, but the solicitors refused.

On November 28 Messrs. Wingfield & Co., who had acted for the testator in an action brought against him in his lifetime and delivered their bill of costs to him in February, 1906, applied to the defendant's solicitors for payment. On the same day the defendant's solicitors answered that their client admitted Messrs. Wingfield & Co.'s claim subject to taxation, but could not pay it as the estate was probably insolvent. On the same day Messrs. Wingfield & Co. commenced by originating summons the second action for administration of the testator's estate. On December 11 an order for administration was made in the second action by consent. On December 12 proceedings in the first action were stayed, and on December 13 Masson & Co. took out this summons in the second action for the conduct of the proceedings and it was adjourned into Court.

The plaintiffs in the first action put in affidavits that the

testator had never disputed their claim and had been present when his wife selected the dresses. On the other hand, the defendant's solicitors put in an affidavit that they had acted for the testator for years and that to their knowledge he had always disputed Masson & Co.'s claim on the ground that he made his wife a sufficient annual allowance for dress, that the account was debited and sent in to his wife and not himself, and that even if he were liable the charges were exorbitant.

In February, 1906, Masson & Co. had commenced proceedings against the testator in the Supreme Court of New York to recover the same claim and the testator had put in an answer, which according to the practice of that Court was sworn to, denying that he was indebted.

Micklem, K.C., and *Greenwood*, for the plaintiffs in the first action. It is a settled rule of practice that where there are concurrent actions for administration and a judgment is obtained in one of them, the conduct of proceedings is given to the plaintiff in the action which was commenced first: *In re Swire* (1); *Townsend* v. *Townsend* (2); *Jeudwine* v. *Agate*. (3) It makes no difference that the plaintiff's claim is disputed if he has put in evidence which prima facie entitles him to an order.

[*Eve, K.C.*, for the plaintiffs in the second action, referred to Seton on Judgments, 6th ed. p. 1524, and *Smith* v. *Guy*. (4)]

In *Smith* v. *Guy* (4) the plaintiff could have proved his claim and had not done so. The general rule is to prevent racing, and there could hardly be a stronger instance of racing than the present case.

Eve, K.C., and *Van Neck*, for the plaintiffs in the second action. We do not dispute the general rule that where there are no special circumstances the conduct will be given to the plaintiff in the first action, but the rule is not invariable and does not apply where the plaintiff's claim is disputed. [They were stopped by the Court.]

SWINFEN EADY J. It has not been contended that the admission by the defendant of Messrs. Wingfield & Blew's

(1) (1882) 21 Ch. D. 647.
(2) (1883) 23 Ch. D. 100.
(3) (1828) 5 Russ. 283.
(4) (1846) 2 C. P. Cooper, 289, 297.

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claim was improper. This application is made by the plaintiffs in the first action. They are a firm of costumiers, who claim to be creditors of the testator's estate for the balance of a bill for 316*l.* 18*s.* for dresses and other articles supplied to his wife during a period of about a year and a half. The affidavits filed in support of this claim state that the testator never disputed the claim in his lifetime, and that there is no reasonable bona fide defence to the claim. When the facts are looked at it appears that there is no foundation for the statement that the testator did not dispute the claim. He was sued for it in New York, and put in a defence, which was sworn to, that he was not indebted. The testator died before this action was tried. The defendant's solicitor has made an affidavit that he acted for the testator for years, and the grounds of defence were that the testator made his wife a sufficient allowance for dress, that credit was given to her and not to him, and that the charges were exorbitant. These are the grounds of defence relied upon. The plaintiffs say that although their claim is disputed on these grounds they are entitled to the conduct of the action because their writ was issued first. I never heard of a case where the conduct was taken from a creditor whose claim was properly admitted and given to one whose claim was bona fide disputed, merely because he was the first to commence an action.

In re Swire (1) was relied on as establishing a universal rule that the conduct of proceedings will be given to the plaintiff in the first action. In that case the plaintiff in the first action was the assignee of a share in the residuary estate. There was no dispute as to his title, and in his judgment Cotton L.J. said: "In this case the respondents admitted, as they could not help doing, the general rule, that where there are two suits to administer an estate and the decree is submitted to in the second, the plaintiff in the first gets the conduct of the proceedings. That is not an inflexible rule; and under special circumstances the Court can act as, under the special circumstances, it thinks right, but that is the general rule."

(1) 21 Ch. D. 647, 655.

It was contended that the rule applied if the plaintiff in the first action had produced such prima facie evidence as would entitle him to an order for administration, and that if his debt was sufficiently established to entitle him to an order for administration, it was also sufficiently established to entitle him to the conduct of an order previously obtained by another creditor. But I cannot accede to that argument. If the circumstances of an estate render an order for administration necessary or expedient, it is usually desirable that it should be made promptly, and such an order, once made, enures for the benefit of all creditors, even although the plaintiff may ultimately fail to establish any debt. These considerations have no application to the case of taking away the conduct of an order already made from an admitted creditor who is proceeding diligently, and giving it to a person claiming to be a creditor, but whose debt is disputed, and who may not be a creditor at all.

There is no general rule which compels me to give the conduct of proceedings to the applicants in the present case, and having regard to the nature of the applicants' evidence, and the fact that there is a bona fide undisputed debt due to the plaintiffs in the second action, I ought not to take the conduct of the proceedings from them. I therefore refuse the application.

Solicitors: *Cohen & Cohen; Wingfield & Blew; Blair & Girling.*

J. R. B.

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March 16.

In re PALMER.
LANCASHIRE AND YORKSHIRE REVERSIONARY INTEREST COMPANY *v.* BURKE.

[1907 P. 598.]

Trustee—Practice—Assignment of Share in Reversionary Fund—Distribution—Payment to Assignee—Right to Delivery of Assignment.

On the distribution of a trust fund, a share in which has been previously assigned, the trustee has no right to require the delivery to him of the assignment and other documents of title before payment of the share to the assignee.

By a post-nuptial settlement dated August 19, 1876, a sum of 10,000*l.* was assigned to trustees, upon trust to invest and pay the income to Mrs. Ellen Palmer for life, and after her death in trust for all the children of her said marriage who should attain twenty-one or marry in equal shares. There were eleven children of the marriage, of whom ten lived to attain vested interests under the settlement. By an indenture dated March 5, 1901, Harry Arthur Palmer, one of the sons, mortgaged his reversionary share under the settlement to the plaintiffs, the Lancashire and Yorkshire Reversionary Interest Company, for 200*l.*, and by an indenture dated November 13, 1901, he assigned the share to them absolutely. By an indenture dated May 21, 1901, Edward James Palmer, another son, mortgaged his share to J. B. Umpleby for 350*l.*, on December 24, 1901, he executed a further charge for 57*l.*, and by an indenture dated July 11, 1902, the said Edward James Palmer and his mortgagee assigned his reversionary share under the settlement to the plaintiffs.

Mrs. Palmer died in 1906, and the plaintiffs claimed payment of the two shares assigned to them. The defendant, who was the sole surviving trustee of the settlement, admitted the plaintiffs' title, but refused to pay over the shares unless the mortgage deeds and assignments constituting the plaintiffs' title were delivered to him on completion. The plaintiffs refused to

hand them over, and took out this summons in the Manchester District Registry for an order that the defendant should pay the shares to them and a declaration that he was not entitled to insist on their delivering up the deeds relating to their title.

Radford, for the summons. There is no direct authority on the point. But I submit that the claim of the trustee is unheard of. Godefroi on Trusts, 2nd ed. p. 469, discusses the duty of trustees who are distributing a fund, and in Lewin on Trusts, 11th ed. p. 411, there is a discussion of the right of a trustee to a release, but in neither place is there any suggestion of a right to delivery of the deeds. The company brought the deeds into existence, and they or the assignors paid for them; the burden is on the trustee to shew how he has acquired any right to them. There is no privity between the company and the trustee.

The case is analogous to that of a forfeited lease, which it has been held the lessor cannot detain as against the lessee: *Hall* v. *Ball* (1); *Elworthy* v. *Sandford*. (2) It is settled that a trustee cannot claim delivery up of a power of attorney under which he has made a payment.

Church, for the trustee. I agree that there is no precise authority, but the trustee is entitled to the deeds in principle, because they are necessary for his protection: *Maynard* v. *Consolidated Kent Collieries Corporation*. (3) If anything were wrong about the assignment an action would be brought against the trustee, and he would be in a very unfortunate position if he could not produce the deeds. There is no contract, and the Court will consider who has the greatest interest. When the money is once paid the company will have no more interest in the assignment and no reason for keeping it. [He also referred to *In re Lehmann and Walker's Contract*. (4)]

SWINFEN EADY J. This summons raises the question whether a trustee of a fund of personalty, who has to pay over a distributive share to a person to whom it has been assigned, can refuse to pay until the deeds forming the assignee's title are handed over.

(1) (1841) 3 Man. & G. 242.
(2) (1864) 34 L. J. (Ex.) 42.
(3) [1903] 2 K. B. 121.
(4) [1906] 2 Ch. 640.

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In this case the person entitled to one-tenth share has executed two deeds, a mortgage and an assignment, to the plaintiffs, and the person entitled to another one-tenth has executed three deeds, a mortgage and a further charge to a third person and an assignment to the plaintiffs. The shares have become payable, but the trustee says to the defendants, "I will not pay over the cash to you except against delivery up of the deeds." No authority has been produced in support of the trustee's contention. The deeds do not belong to the trustee in point of law; nor has he paid for them. The deeds purport to be mortgages, and assignments to the company. The trustee is not purchasing from the company anything like an interest in land which the deeds would go with. The company has offered the usual acknowledgment and undertaking; but that is not enough for the trustee, he insists on the delivery up of the deeds. In my opinion the trustee has not established any right to the deeds, nor is it the practice that when a trust fund is being distributed amongst incumbrancers and assignees, as well as cestuis que trust, all the subsidiary deeds should be handed over. Where the money is in Court, the Court never requires the deeds to be delivered up before paying it out. Where money is paid by a trustee to a person who receives it under a power of attorney, the trustee cannot claim that the power of attorney should be given up to him. It was said that the trustee would be in a very unfortunate position if an action were brought against him for the fund and he had not the deeds; but it might equally be said that the company would be in a very unfortunate position if they handed over the deeds and the assignor disputed the assignment and brought an action against the company to set it aside.

There must be an order as asked by the summons.

Solicitors: *Blair & Seddon, Manchester; Edwards, Heron & Co., London.*

J. R. B.

SOCIETY OF ACCOUNTANTS AND AUDITORS *v.* GOODWAY AND LONDON ASSOCIATION OF ACCOUNTANTS, LIMITED.

[1906 S. 542.]

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Jan. 28, 29, 30, 31.

Trade Name — Professional Designation — "Incorporated Accountant" — Descriptive or Fancy Name—Use of Name appropriated to particular Society—Unauthorized Use by another Society and by Individuals—Legal Injury—Injunction.

The plaintiff society was incorporated in 1885 under the Companies Act, 1867, as a company not for gain without the use of the word "limited" under licence of the Board of Trade. In 1886 the plaintiff society recommended its members to adopt as their professional designation the use after their names of the term "incorporated accountant." By 1905 that designation had come to mean to that section of the public who had dealings with accountants a member of the society, which, by its system of tests and examinations, had conferred upon its members the valuable privilege of a recognized status for ability and integrity. In that year the defendant association was incorporated under the Companies Acts as a company limited by guarantee. Shortly after its incorporation its council recommended its members to adopt the designation "incorporated accountant" with the addition of the abbreviation "Lon. Asson."

In an action by the plaintiff society against the defendant association and G., one of its members, claiming (1.) an injunction to restrain G. from using in connection with his business of accountant the designation "incorporated accountant," and (2.) an injunction to restrain the defendant society from holding out by advertisements or otherwise that its members were entitled to use such designation :—

Held, that the designation "incorporated accountant" was a fancy and not a descriptive term, and had come to denote membership of the society, and, therefore, that the unauthorized use of it inflicted an injury on the plaintiff society, in respect of which it was entitled to maintain an action.

Held, also, that the plaintiff society had a pecuniary interest in preventing the defendant association from attempting, by representations and inducements held out to members of the profession, to reduce the status of the plaintiff society by conferring improperly an indication of that status.

Held, therefore, that the plaintiff society was entitled to the injunctions which it claimed.

Society of Accountants in Edinburgh v. *Corporation of Accountants, Ld.*, (1893) 20 R. 750, followed.

ACTION.

The Society of Accountants and Auditors (below called "the

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society ") was a body of accountants incorporated by the registration of a memorandum and articles of association in December, 1885. The society was registered with limited liability without the addition of the word "limited" to its name under licence from the Board of Trade, pursuant to s. 23 of the Companies Act, 1867.

The objects of the society, as stated by clause 3 of its memorandum of association, were (inter alia):—

"(*a*) To provide a central organization for accountants and auditors, and generally to do all such things as from time to time may be necessary to elevate the status, and procure the advancement of the interests of the profession.

"(*b*) To provide for the better definition and protection of the profession by a system of examinations and the issue of certificates.

"(*c*) To promote and foster in commercial circles a higher sense of the importance of systematic and correct accounts, and to encourage a greater degree of efficiency in those engaged in book-keeping."

In 1886, shortly after the incorporation of the society, its council recommended the members to adopt as their professional designation the term "incorporated accountant," and emphasized that recommendation in their report for the year 1888, which was issued in April, 1889, in these terms: "The Council again desire to urge upon the fellows and associates the desirability of making all possible use of the style 'incorporated accountant,' and press upon the members generally the imperative importance of bringing the objects and aims of the society constantly under the notice of members of Parliament and local authorities."

From 1887 to 1891 the society inserted in the *Law Times* an advertisement in these terms: "The Society of Accountants and Auditors (Incorporated 1885). The fellows and associates of this society practise in all parts of the United Kingdom, and are styled 'Incorporated Accountants.'" That advertisement was for a short time inserted also in the *Solicitors' Journal*.

In 1889 the society established a journal, which was called the *Incorporated Accountants' Journal*. It also published, and

had for some years prior to the present action, published a book called the Incorporated Accountants' Year Book.

A large number of its members described themselves, and had for some years described themselves, on their letter-heads and other business documents as "Incorporated Accountants." In the notices of the appointments and releases of trustees in bankruptcy published in the *London Gazette*, members of the society were frequently described as "incorporated accountants."

The London Association of Accountants, Limited (below called "the association"), was a company registered in 1905 under the ordinary provisions of the Companies Acts as a company limited by guarantee. Its objects were similar to those of the society, and after its incorporation it proceeded to give effect to those objects by holding examinations, hoping, as the association alleged, by that means to give to its members a status which would distinguish them from the ordinary body of accountants.

In 1903 the Revenue Act, 1903 (3 Edw. 7, c. 46), was passed, which by s. 13 provided, with reference to appeals under the Income Tax Acts, that the Commissioners should under certain circumstances hear a barrister, solicitor, or accountant on behalf of the appellant, and that the term "accountant" in the section should mean a person who had been admitted as a member of an incorporated society of accountants.

The attention of the council of the association having been drawn to this Act, they thereupon issued a circular in which, after stating that they had had s. 13 under their consideration, and expressing an opinion that the association was an incorporated society of accountants within the meaning of that section, and that members of the association were entitled to the privileges thereby conferred, proceeded to state that they were of opinion that "the most correct designation which members can adopt (especially having regard to the Act of Parliament quoted above) is that of 'incorporated accountant,' but in view of the fact that this description has been adopted by many of the members of another body, the council recommend that the abbreviation 'Lon. Asson.' "—London Association—"should be added. In the opinion of the council the body referred to"—that is, the

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society—"has no exclusive right to the title in question"—that of "incorporated accountant"—"which can be used by the members of the association, with the addition of the abbreviation mentioned."

In consequence of that announcement G. A. Goodway and many other members of the association adopted and used on their business cards and letter paper and upon door plates the designation "incorporated accountant" or some abbreviation of those words.

This was an action brought by the society against the association and Goodway, claiming—(1.) that Goodway might be restrained from using in connection with his business of accountant and debt collector or either of such businesses the title or designation "incorporated accountant" and from using in letters, accounts, or notices, or any circulars or other advertisements the designation of "incorporated accountant" or any designation only colourably differing therefrom in such way as to represent or lead to the belief that the defendant was a member of the plaintiff society; and (2.) that the association might be restrained from holding out or representing by advertisements or otherwise that its members were entitled to use any such designation as aforesaid.

The society by its statement of claim alleged that the designation "incorporated accountant" had been used by its members for the last twenty years and not, until the incorporation of the association, by any other persons; that by reason of such continual and exclusive use of the designation it had acquired a well-understood meaning, namely, that the person using it was a member of the society; and that the generally high professional standard maintained by the society among its members had given the designation a considerable value. It further alleged that if the designation were to be used by persons over whom the society had no control, and whose qualifications were not such as to render them eligible for membership of the society, the society and its members would be brought into discredit, the value of the designation would be destroyed, and the object for which the society was formed would be entirely frustrated.

The defendant Goodway, by his defence, denied that the

designation had acquired any such meaning as alleged or had in any way become identified with the society.

The association, by its defence, traversed the allegations in the statement of claim, and alleged that the use of the designation "incorporated accountant" in no way represented or led to the belief that the person using it was a member of the society and that the members of the association were entitled to use that designation.

Warmington, K.C., *Rowden*, K.C., and *A. R. Kirby*, for the society. At the time of the incorporation of the association the designation "incorporated accountant" was understood by the public to denote membership of the society. The phrase "incorporated accountant" as a phrase is ridiculous. A person cannot be incorporated. That shews, therefore, that the term is not a descriptive, but a fancy term, and that there must be some secondary meaning attached to it. That secondary meaning implies, it is submitted, membership of the society. But whether or not the words are meaningless in themselves, they have acquired a special meaning among persons having dealings with accountants, and must not therefore be used in such a way as to deceive: *Reddaway* v. *Banham*. (1) The point whether the society, being a society established not for gain, can maintain the present action is a new one in English law. In all the cases decided as to the improper use of a name the use complained of has been in connection with a business, and there is no reported decision, with the exception of *Clark* v. *Freeman* (2), in which a non-trader has claimed an injunction to restrain the use of a name. In *Clark* v. *Freeman* (2) such a claim was made, but the injunction was refused. With regard to that case, however, Selborne L.C. in the course of the argument in *In re Rivière's Trade Mark* (3) said that that case had seldom been cited but to be disapproved. The question did, however, come before the Court of Session in Scotland in *Society of Accountants in Edinburgh* v. *Corporation of Accountants, Ld.* (4) in circumstances similar to those in the present case; and it was held that the

(1) [1896] A. C. 199, 213.
(2) (1848) 11 Beav. 112.
(3) (1884) 26 Ch. D. 48, 53.
(4) 20 R. 750.

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plaintiffs were entitled to an interdict, the equivalent to an injunction in England. Although the society by its constitution is prohibited from dividing any bonus or dividend amongst its members, it does nevertheless carry on the business of protecting its members against other accountants and promoting their interests. If the members of the association are allowed to use the designation "incorporated accountant," the status of the members of the society as regards character and efficiency will be lowered. The defendant Goodway, by using the designation "incorporated accountant," is inflicting an injury on the society, and ought therefore, it is submitted, to be restrained by injunction from continuing to do so. The society is also entitled to an injunction against the association. It is true that in *Society of Accountants in Edinburgh* v. *Corporation of Accountants, Ld.* (1) the interdict was only granted against the defendants the individual members, and not against the defendant company itself, but it was not there alleged that the defendant company had taken any corporate action with regard to its members adopting the designation there in question. If an association like the present takes upon itself to suggest and to recommend to its members the illegal use of a name the Court can, it is submitted, grant an injunction to restrain it from so doing. If, therefore, the use by the defendants of the designation "incorporated accountant" is a legal wrong, there can be no legal difficulty in restraining the association from recommending its use.

H. Terrell, K.C., *Ashton Cross*, and *Duka*, for the defendants. In this case the Court has two questions to decide—(1.) whether on the evidence the designation "incorporated accountant" has acquired a secondary meaning; and (2.) whether, assuming that it has, the defendants have threatened to do anything to interfere with its use. To consider the matter first upon principle. The Court has no jurisdiction to grant an injunction unless the person against whom such injunction is sought has been guilty of an infringement of the plaintiff's proprietary right or has threatened to commit a legal wrong. The Courts have established one exception to this rule, and that is with regard

(1) 20 R. 750.

to the wrongful taking of a name, and have treated that as an infringement of a legal right. Under English law the Court can only interfere at the instance of the person whose legal right has been infringed.

[WARRINGTON J. The same wrong may be done to A. and B. Why should not the members of a particular society possess a legal right by reason of their being members of that particular society?]

Suppose it is a valuable privilege for a person to be able to say that he is a Londoner, and a person who is not a Londoner says he is one, could the city object? The wrong, if any, in the present case is done to the individual members of the society, and not to the society itself. If a person not a member of the society were to start business at Birmingham as an "incorporated accountant," and the society brought an action against him alleging that if he were allowed to do so other persons might do the same and that the society would thereby lose members, the damages in such a case would be too remote, and could not, therefore, be recovered at law; and accordingly an injunction would not be granted in a Court of Equity. If a person chooses to style himself a lord no one can prevent him from doing so: *Earl Cowley* v. *Countess Cowley*. (1) *Society of Accountants in Edinburgh* v. *Corporation of Accountants, Ld.* (2) does not apply. The basis of Lord Young's decision there was that the defendants were calling themselves chartered accountants, which in fact they were not. Here the members of the association do belong to an incorporated society, and are therefore incorporated accountants. In *Clark* v. *Freeman* (3) Lord Langdale held that the Court would not interfere to stop the use of a name where there was no injury to property. The decision on that point has never been overruled. [They also referred on this point to *Walter* v. *Ashton*. (4)] There is no evidence here that the society has suffered any injury in respect of a right of property. The society claims a monopoly in the use of the words "incorporated accountant."

[WARRINGTON J. The society does not claim a monopoly. It

(1) [1901] A. C. 450.
(2) 20 R. 750.
(3) 11 Beav. 112.
(4) [1902] 2 Ch. 282.

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only claims that the defendants are not entitled to use the term in such a way as to represent that members of the association are members of the society.]

The words "incorporated accountant" are ordinary English descriptive words, and mean that the person using them is a member of a society incorporated otherwise than by charter.

[WARRINGTON J. You must give a special meaning to the term. I am not sure that the term "chartered accountant" is not as inaccurate as the term "incorporated accountant." In no sense of the word has a chartered accountant a charter. He is merely a member of a chartered society. "Chartered accountant" and "incorporated accountant" seem to me to be merely fancy terms to distinguish the members of the one society from the members of the other.]

The word "incorporated" is an ordinary English word.

[WARRINGTON J. Its legal meaning is "united in a legal body."]

It would be straining the meaning of the word to hold that it implies more than that the person using it is a member of a society incorporated otherwise than by charter. If that is so it is an ordinary English descriptive word. There are no words in the English language which would more properly describe the members of the association than "incorporated" and "corporate." The Court ought not, therefore, to interfere to prevent persons from using words in their ordinary sense. The society relied upon *Reddaway* v. *Banham* (1), but that case has been distinguished in every case in which it has been cited on the ground that an intention to deceive was there admitted: see *Cellular Clothing Co.* v. *Maxton & Murray*. (2) It is admitted that that case does not assist the defendants if the Court is prepared to hold that the term "incorporated accountant" is a fancy name. But, assuming that it is merely a descriptive term, anyone may use it notwithstanding persons may thereby be deceived: *Cellular Clothing Co.* v. *Maxton & Murray* (2); *Seigert* v. *Findlater*. (3)

Rowden, K.C., in reply.

(1) [1896] A. C. 199. (2) [1899] A. C. 326.
(3) (1878) 7 Ch. D. 801, 813.

[WARRINGTON J. What do you say as to the society's right of action as against the association?]

The association invites and recommends its members to use the term "incorporated accountant," which, it is submitted, is an infringement of the society's right. It recommends the use of the actual term, and claims the right to do so.

WARRINGTON J. This is an action in which the Society of Accountants and Auditors is plaintiff, and G. A. Goodway, an accountant, and the London Association of Accountants, Limited, are defendants. The society alleges that Goodway, by using as a description of himself in his business capacity the term "incorporated accountant," is doing that which is calculated to induce persons to believe that he is a member of the society, and that he thereby inflicts a legal injury upon the society, in respect of which it is entitled to an injunction. As against the association, the society alleges that the association, by representing, as it does, that its members are entitled to do that which is done by Goodway, is also inflicting a legal injury upon the society, and ought also to be restrained by injunction.

Before I state the facts, I think it desirable that I should state precisely what the question is which I have to determine. The question of the effect of the use of the term "incorporated accountant" is ultimately one of fact—namely, did the term in the contemplation of that section of the public who had dealings with accountants prior to the acts complained of denote that the person to whom it was applied was a member of the society and so distinguish him from other members of the same profession? Assuming that the society establishes that, then it would seem to me to follow that the person using the term is doing that which is calculated to induce persons to believe that he is a member of the society. The question is one which is analogous to, though not identical with, that arising in cases of passing off of goods as and for the goods of another, and must, I think, be decided mainly on the same principles.

The case of *Cellular Clothing Co.* v. *Maxton & Murray* (1) in my opinion establishes that if a term is merely descriptive of

(1) [1899] A. C. 326.

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the class of goods—that being, of course, strictly a case of passing off goods as and for the goods of another—it is extremely difficult for a plaintiff to prove that it has lost that meaning and has come to denote exclusively goods of the class in question of his (the plaintiff's) manufacture. I think that case also establishes that the Court ought not to be astute to find that a plaintiff, in cases similar to the present, has acquired a monopoly; on the contrary, I think the case establishes this—and I certainly am applying myself to the present case with that view—that the Court ought rather, in the interests of the public, to see that nothing in the nature of a monopoly is established except upon good and sufficient grounds.

In reference to the first principle which I have mentioned as having been established by *Cellular Clothing Co.* v. *Maxton & Murray* (1), I should say this. I must determine this further question, Is the term "incorporated accountant" a descriptive term, or is it—to use a convenient phrase, though not, I think, quite an accurate one—a fancy term? I only use that phrase as opposed to the expression "descriptive term." In my opinion it is not descriptive. As applied to such matters as those with which I have to deal, the word "incorporated" is, I think, accurately defined in a dictionary of standing as meaning "united in a legal body." Now obviously to speak of an individual as united in a legal body is ridiculous. The word can only properly be used as having reference to a number of persons who, for purposes of legal status, together in the eye of the law constitute one person, and who are usually technically described as a corporation. In the context in which the word is used, therefore, some special or fancy meaning must for the purpose of this case be given to it. The meaning which it is suggested by the association it bears is "member of a body of accountants incorporated otherwise than by charter." Now that is still more a fancy term than if the more extended and obvious meaning—which I think is in itself an inaccurate and therefore a fancy expression—were given to it, namely, "member of an incorporated society." That would be much more nearly descriptive than the only meaning which in this case can be suggested applies to it.

(1) [1899] A. C. 326.

The result, in my opinion, is that the expression or phrase is not a "descriptive term" as that term is intended to be used, and is used, in the speeches of the Law Lords who addressed the House in *Cellular Clothing Co.* v. *Maxton & Murray* (1), and therefore the difficulty in the way of a plaintiff's proof, which was emphasized in that case, is not to be found in the present case. [His Lordship then stated the facts with reference to the society, and continued:—] The society had, I think, unquestionably, before the association came into existence, obtained a position, which was not perhaps equal to that of the Institute of Chartered Accountants, but was second only to it; and, in my opinion, that is illustrated by the fact that in many recent Acts of Parliament relating to various local bodies provisions have been inserted, as to the qualification necessary for the office of auditors of those local bodies, that persons must be members of the Institute of Chartered Accountants or of the society. The society has acquired for its members the status which it gives by means of examinations and otherwise, on which, especially in recent years as the society has become more extended, it has expended considerable sums of money. [His Lordship then referred to the evidence of a large number of persons—district registrars, official receivers, solicitors, and other persons of business and experience from different parts of the country—as to the meaning and effect of the term "incorporated accountant," and continued:—]

I find as the result of that evidence that the designation "incorporated accountant" had by the year 1905, when the society was established, come to denote, with persons who had to deal with accountants, an accountant who was distinguished from the rest of the accountants' profession by being a member of that society—although they did not always know its name—which, by examinations and otherwise, conferred a status on its members similar to that conferred by the Institute of Chartered Accountants on those who were called chartered accountants. There was, in fact, at that time no other society of accountants in existence except the society and the Institute of Chartered Accountants; and it seems to me immaterial whether in every case the person who spoke to the reputation, or the persons

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among whom he spoke of that reputation as existing, knew or did not know the name of the society. What I am satisfied of is that they considered that that designation denoted membership, not of any society whatever of accountants which was incorporated, but membership of the definite incorporated society which, by its tests and examinations and by its rules and requirements as to qualification, conferred on its members a status different from that of other members of the profession who had not the same qualification. In coming to that conclusion I am driven to hold that in the year 1905 the designation "incorporated accountant" did mean a member of the society, and did confer on the members the privilege—which one cannot help regarding as a valuable one—of being looked on, by persons who had dealings with accountants, as holding a certain definite status indicating reliability and integrity. [His Lordship then stated the facts with reference to the association, and observed that he accepted without the least hesitation the statement of the officials of the association that they proposed to hold, and had in fact during the year 1906 held, examinations which were effective, and that they hoped by that means to give to the members of the association, when it became better known than at present, some status which would distinguish them from the general body of accountants. He continued:—]

At the Bar the association has, as I understand, asserted the right to use the designation "incorporated accountant" without the addition of the abbreviation "Lon. Asson."; but I do not think that that very much matters, because it seems to me, after the evidence I have heard, that that abbreviation really makes very little difference if the designation "incorporated accountant" has the meaning which I think it has. Persons probably do not know the exact name of the society the membership of which confers the right to use the designation "incorporated accountant," and therefore the addition of the abbreviation "Lon. Asson." would tell those persons nothing. The important point is that the association recommends the use of the term "incorporated accountant."

The question then is, Are the defendants justified in using and in recommending to members of the association the use of the

designation "incorporated accountant"? I desire to deal first with the defendant Goodway, who uses on his letter paper and other business documents the designation "incorporated accountant," with the abbreviation "Lon. Asson." added in very small letters. I think there is no question but that he is doing that which is calculated to induce the public to believe that he is a member of the society.

Then the next question which arises is, Can the society complain of what Goodway is doing? Is he thereby inflicting upon it an injury in respect of which it is entitled to relief? That is a new point of law in England. So far as I am aware, there is no case, and no case has been cited to me, in which the question has been decided whether an incorporated body, such as the society here, can be regarded as suffering a legal injury by reason of a person who is not a member of that body representing himself to be a member of it; but a case of that nature did come before the Court of Session in Scotland in *Society of Accountants in Edinburgh* v. *Corporation of Accountants, Ld.* (1) That case was decided first by the Lord Ordinary in the Outer House, and it afterwards went to the Inner House; which is equivalent to our Court of Appeal; and the Lord Ordinary and the learned judges of the Inner House all agreed that the plaintiffs there were entitled to the interdict—which is equivalent to an English injunction—which they sought. The facts of that case were these: The plaintiffs were three chartered societies of accountants in Scotland, one in Edinburgh, one in Glasgow, and one in Aberdeen. Their members were accustomed to use as their professional designation the letters "C.A." after their names, indicating "chartered accountants." It was established that those letters, when used after a person's name, denoted that the person so using them was a member of one or other of those three societies. The defendants were a limited company called the Corporation of Accountants and two individual members of that company. The two individual members asserted the right to call themselves "corporate accountants," as being members of the Corporation of Accountants, and (and this was the point) to use the letters "C.A." as an abbreviation

(1) 20 R. 750.

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of "corporate accountant." The Lord Ordinary and the Lords in the Inner House unanimously came to the conclusion that the chartered societies were entitled to prevent the defendants from using the letters "C.A." or any similar designation which would lead people to believe that they were members of one or other of those chartered societies. It is true that in arriving at that decision the Lord Ordinary emphasized the fact that the plaintiff societies were chartered societies, and that it might be said that what the defendants were doing was an infringement of the charter; but I think the judgments of the Court there—not only of the Lord Ordinary, but especially the judgments in the Inner House—were put on a much wider ground, namely, that a body, however incorporated, has a right to prevent persons who are not members of it from representing themselves to be members of it. In the case before me there seems to be little difficulty in coming to that conclusion, for the reason that it is established by the evidence that membership of the society confers a status, a valuable privilege, on its members. It is therefore a matter of pecuniary interest to the society that it should have as many members as possible. Obviously the possession of this definite status arising from the fact of membership is an inducement to persons to become members, and anything which would reduce the value of that status would tend to remove some of the inducements which would actuate persons in becoming members of the society. Looked at in that way, it seems to me that the society has a pecuniary interest in preventing persons who are not its members, and are not entitled to the status which its membership confers, from representing that they are its members and are entitled to that status. It seems to me therefore, both on the authority of the case to which I have referred and on principle, that the unauthorized use of the designation "incorporated accountant" representing, as on the facts I think it does, that the person using it is a member of the society, does inflict a legal injury on the society, in respect of which it is entitled to relief.

With regard to the association the matter stands on a somewhat different footing. The association is not, of course, itself practising as an accountant and in that sense using the

designation "incorporated accountant"; but what it is doing is this, it is for the purpose of obtaining advantage to itself—namely, of inducing as many persons as possible to become members of the association—holding out to accountants at large that if they become members of the association they will be entitled to use the designation "incorporated accountant," with such resulting advantages as the use of that term will confer. If I am right in saying that the society has a pecuniary interest in maintaining the designation "incorporated accountant" as a term indicating membership of the society, then it seems to me that it has a pecuniary interest in preventing the association from endeavouring by means of those representations and inducements to reduce the status of members of the society by improperly conferring an indication of that status by the use of that term.

It seems to me therefore, on the whole, that the society is entitled to an injunction as against the defendant Goodway to restrain him from using the words practically in the terms of paragraph 1 of the claim in the statement of claim, and to an injunction as against the association in the terms of paragraph 2 of the claim in the statement of claim; but, in order to make sure that the second injunction does not go too far, there ought to be added in paragraph 2 of the claim after the words "to use any such designation as aforesaid" the words "in such way as to represent, or lead to the belief, that its members are members of the society." I ought to add that I think it is established that the association adopted the term in order that it might bring its members within the terms of s. 13 of the Revenue Act, 1903, and that it had not any direct intention of defrauding the society; but I do not think it is necessary, in an action like the present, that the society to succeed must make such a case.

Solicitors: *Norton, Rose, Barrington & Co.; Tiddeman & Enthoven.*

W. I. C.

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Jan. 31;
Feb. 1, 11, 13

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[1905 B. 3154.]

Schools (Education)—Non-provided School—Religious Instruction—Time-table approved by Board of Education—Directions of Local Education Authority as to Secular Instruction—Non-compliance with by Managers—Withdrawal of Maintenance—Appeal by Managers—Decision of Board of Education—Jurisdiction of Court—Closing of School—Trespass—Inducing Teachers to break Contracts—Education Act, 1902 (2 *Edw.* 7, *c.* 42), *s.* 7, *sub-s.* 3.

For many years prior to 1905 it had been the custom of the managers of the M. School, a non-provided school under the Education Act, 1902, to take the children from school to church on saints' days and holy days during the hours allowed for religious instruction. The time-table of the school, which had been approved by His Majesty's inspector, provided that religious observance and religious instruction should be given from 9 A.M., when the school opened, till 9.55; that at 9.55 the registers should be marked; and that secular education should commence at 10 A.M. and continue till noon. At the foot of the time-table was a note providing that on saints' days and holy days the registers should be marked at 9 A.M., the object being to enable the children to be taken to church at 11 A.M. In September, 1904, the local education authority under the Act of 1902 issued a direction that secular instruction in all schools within their district should commence not later than 9.45 A.M. and occupy the school hours for the rest of the day. The managers did not comply with this direction, and continued to take the children to church on saints' days and holy days, and took no steps to revise their time-table to bring it in accordance with the direction of the local education authority. On March 25, 1905, the local education authority ceased to maintain the school, and on March 27, 1905, sent their inspector to the school, who closed it, informing the children that they must attend other schools in the neighbourhood, and offering the teachers appointments in other schools, which they accepted. The managers appealed to the Board of Education, but the Board confirmed the action of the local education authority. In an action brought by the managers claiming (1.) a declaration that the local education authority were bound to continue to maintain the school, and (2.) damages for trespass and illegal acts in closing the school and inducing the teachers to leave the service of the managers without due justification:—

Held, that the direction of the local education authority was a direction as to secular instruction under s. 7, sub-s. 1 (*a*), of the Act of 1902, and that the question, being therefore one which arose under s. 7 of that Act, was one for the decision of the Board of Education under sub-s. 3

of that section, and that the jurisdiction of the Court was therefore excluded.

Held, also, that the managers by virtue of their appointment under the Act of 1902, had not, in the absence of a special arrangement with the owner, such a possession of the school premises as would enable them to support an action of trespass; that no such arrangement had been proved; and that the claim for trespass therefore failed.

Held, further, on the facts, that the local education authority had not induced the teachers to break their contracts with the managers without justification.

ACTION.

The plaintiffs were the managers for the purposes of the Education Act, 1902, of the Marston St. Lawrence public elementary school, and the defendants were the local education authority for the purposes of such Act for the county of Northampton, within which area the school was situate.

The school premises were built about the year 1847, and were the property of private owners, with whose permission they had been from 1847 onwards used by a body of managers as a national school in connection with the Church of England. In 1877 the school was put under Government inspection, and became a public elementary school within the meaning of the Elementary Education Acts. After 1877 the owners continued to allow the use of the school premises voluntarily and without rent for the purposes of a public elementary school.

For many years previously to 1877, and subsequently down to the events hereinafter mentioned, it was the custom of the managers for the time being of the school to take the children from the school to church on saints' days and holy days during the time allowed for religious instruction. From about February, 1893, the practice had been on saints' days and holy days to mark the registers at the school at 9 A.M. and to take the children to church at 11 A.M. The time-table of the school providing for such marking on such days was from time to time approved by His Majesty's inspectors, and was so approved on February 4, 1904.

On ordinary days the register was marked at 9.45 A.M.—10 A.M. The reason for marking the register at 9 A.M. on saints' days and holy days was that in order to obtain the annual parliamentary grant it was necessary that there should be two hours

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consecutive secular instruction, and that would be interfered with if the register were marked at 10 A.M. and the children taken to church at 11 A.M.

On September 30, 1903, the Education Act, 1902, came into operation with regard to the school, which became a public elementary school not provided by the defendants for the maintenance of which the defendants became liable.

At a meeting of the defendants' education committee held on March 26, 1904, certain by-laws were duly made pursuant to s. 74 of the Elementary Education Act, 1870, as amended by the Education Acts, 1876 to 1902, and were duly sanctioned by the Board of Education on June 22, 1904. Such by-laws provided (inter alia) that the time during which every child should attend school should be the whole time for which the school selected should be open for instruction of children of similar age, provided that where a parent had notified to the managers in writing his intention to withdraw the child from instruction in religious subjects such time should be the whole time for which the school selected should be open for secular instruction.

In pursuance of a final order of the Board of Education dated June 6, 1904, the plaintiffs the Rev. C. Blencowe, J. Cherry, R. Barrett and J. M. Killbey were appointed to be the four foundation managers of the school. The plaintiffs T. Curtis and J. Russell were duly appointed by the defendants and the minor local authority—viz., the Marston St. Lawrence Parish Council—respectively to be the two non-foundation managers.

In September, 1904, the defendants, acting through their education committee, issued a circular (circular 45 N.) containing certain directions as to the instruction to be given in non-provided schools within their area. These directions, so far as they are material for the purposes of this report, were the following:—

"*Religious Instruction in Schools.*—The following regulations have been adopted by the Education Committee: . . . .

"2. *Time of Religious Instruction.*

"Secular instruction in all schools shall commence not later than 9.45 A.M., and occupy the school hours for the rest of the day.

"3. *Holidays of Observance.*

"District sub-committees are empowered to allow the closing of any school in their district for a number of days not exceeding ten in any one year in addition to the fixed holidays defined by the education committee.

"This regulation will, it is hoped, meet the wishes of each locality, as for instance in the case of difficulties arising from the feast week in villages, and in the case of days of religious observance which have in some places been uniformly accompanied by a holiday.

"4. *Place of Religious Instruction.*

"In consideration of the answer given in the House of Commons by Sir W. Anson to Mr. Halsey on Friday, June 10 last, religious instruction of children attending an elementary school shall not be given in any place other than the school during the hours in which the school is open, unless it be in connection with the withdrawal of children under the conscience clause."

On November 1 and 30, 1904, being respectively All Saints' Day and St. Andrew's Day, in conformity with the custom before mentioned and in accordance with the authorized school time-table, the children attending the school, except such as claimed exemption under the provisions of the conscience clause, were taken to church at 11 A.M.

On December 16, 1904, the secretary of the defendants' education committee, which had authority to act on behalf of the defendants, wrote to the plaintiff Blencowe, who was the correspondent of the plaintiff managers, stating that the education committee must insist upon the observance of their regulations as to religious instruction, and that the time-table of the school must be revised and submitted to His Majesty's inspector for signature upon his next visit. The plaintiffs took no steps to revise their time-table as requested.

On December 21, 1904, which was St. Thomas' Day, and on March 8, 1905, which was Ash Wednesday, the children attending the school were again taken to church at 11 A.M. under similar

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circumstances to those on previous occasions, except that on the latter occasion one teacher remained behind with certain children and kept the school premises open.

On March 25, 1905, the secretary of the defendants' education committee gave written notice to the plaintiffs that, as they had not agreed to conform to the committee's regulations with regard to the giving of religious instruction, the committee had that day ordered the withdrawal of all financial assistance from the school as from March 1.

The defendants accordingly ceased to maintain the school as a public elementary school under the Education Acts, 1870 to 1902, and on March 27, 1905, sent their inspector to the school, who declared it closed. He also declared that the two mistresses were transferred to other schools in the neighbourhood, and informed the children in the school that they were under obligation to attend other elementary schools in the neighbourhood. At the same time he made the following entry in the log-book of the school: "March 27, 1905. The school was closed this morning, the Northants Education Committee having transferred the teachers.—D. Elliott."

The school had since March 25, 1905, been carried on by the plaintiffs without the financial assistance of the defendants as a certified efficient school.

This was an action by the plaintiffs claiming—(1.) damages for trespass and for illegal acts committed by the defendants and their authorized servants or agents in closing the school and inducing or procuring without due justification the teachers thereof to break their contracts with the plaintiffs; (2.) a declaration that the regulations issued by the defendants as to instruction in schools within their area were, as to regulations 2 and 4 thereof, ultra vires of the defendants and void in law; (3.) a declaration that the plaintiffs were entitled, and had been from March 25, 1905, so entitled, to have the school maintained by the defendants as a non-provided public elementary school in accordance with the Education Acts, 1870 to 1902; and (4.) payment of such sum as might be found due for maintenance from March 25, 1905, in accordance with head (3.) of claim, or damages in lieu thereof.

The plaintiffs, by their statement of claim, contended that the defendants had no power to give directions as to religious instruction in the case of a school in the position of Marston St. Lawrence School. They alleged that the defendants had illegally refused to maintain the school as a public elementary school under the provisions of the Education Acts, 1870 to 1902, and that the defendants had not at any time refused to conform to any regulations made by the defendants or by their committee. They further alleged that the acts of the inspector in closing the school and in transferring the teachers were unlawful, and constituted a trespass in law for which the defendants were responsible, and that the defendants, by causing or permitting the teachers to be so removed and transferred to other schools, induced or procured the teachers to break their agreements with the plaintiffs without justification.

The defendants, by their defence, denied that any of the directions or regulations constituted an interference with any right or power of the plaintiffs under the Education Act, 1902, or otherwise, or was ultra vires of the defendants or void. The directions and regulations were not, they alleged, in fact, and were not described as, regulations for religious instruction, but, as they formed part of a group of directions which directly or indirectly affected religious instruction, they were grouped under a general heading of "Religious Instruction in Schools." They also alleged that the taking of the children to church, as before stated, was unlawful and a breach of the defendants' by-laws and of their directions as to secular instruction. They further alleged that, having regard to s. 7, sub-s. 3, and s. 16 of the Education Act, 1902, the Court had not any jurisdiction with respect to any of the matters or questions alleged or raised in the statement of claim, nor did any action lie in respect of such matter; that in March, 1905, the plaintiffs and the defendants respectively applied to the Board of Education under the provisions of s. 7, sub-s. 3, of the Act of 1902, and that the Board of Education, after due consideration of the material circumstances and the allegations of the parties, decided: (1.) that the regulations complained of were within the powers of the defendants and did not interfere with the reasonable facilities for religious

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instruction during school hours; (2.) that the plaintiffs had failed to comply with such regulations or directions; and (3.) that the defendants had not, in ceasing to maintain the plaintiffs' school, failed in any duty of theirs under the Act of 1902; and further, that the Board had determined that the defendants were not in the circumstances bound to maintain the plaintiffs' school.

The action came on for trial on August 3, 1906, but the trial was by arrangement adjourned until after the Court of Appeal should have delivered their judgment in *Rex* v. *West Riding of Yorkshire County Council* (1), which had recently been heard before them.

Cripps, K.C., Lord Robert Cecil, K.C., and *Montague Barlow*, for the plaintiffs. The questions which arose between the plaintiffs and defendants were not questions arising under s. 7 of the Act of 1902, and therefore the Board of Education had no right under sub-s. 3 of that section to determine them. The decision of the Board, therefore, is not binding on the plaintiffs, and the jurisdiction of the Court is not thereby excluded.

The Board cannot oust the jurisdiction of the Court, as they have no means of deciding or enforcing a decision of these questions. We admit the general principle that, where an Act creates an obligation and enforces the performance of it in a specified manner, performance of it cannot be enforced in any other manner: see per Lord Tenterden in *Doe* v. *Bridges* (2), and adopted in *Pasmore* v. *Oswaldtwistle Urban Council* (3); but we say that s. 7, sub-s. 3, does not apply in the circumstances of this case. The object of that sub-section was to promote the smooth working of s. 7, and was directed to matters of administration, and not of law. No remedy is provided by the Act to enable the plaintiffs to enforce the new statutory rights given them by that section. The defendants contend that the directions issued by them were directions as to secular instruction which they were entitled to give, and that the plaintiffs having refused to obey them they had a right to withdraw the grant from the school.

(1) [1906] 2 K. B. 676. (2) (1831) 1 B. & Ad. 847, 859.
(3) [1898] A. C. 387, 394, 397.

The question, therefore, on this part of the case is whether they had power to give those directions.

The by-laws made by the defendants have no bearing upon the present question. They are directed to compelling the attendance of children at school, and their enactment by the local education authority is compulsory: see Elementary Education Act, 1870, s. 74; Elementary Education Act, 1876, ss. 4, 21; and Elementary Education Act, 1880, s. 2. They are directions to parents, and are not a matter as between the local education authority and the managers of schools.

Sect. 7, sub-s. 2, of the Act of 1870 provides that "The time or times during which any religious observance is practised or instruction in religious subjects is given at any meeting of the school shall be either at the beginning or at the end or at the beginning and the end of such meeting, and shall be inserted in a time-table to be approved by the Education Department, and to be kept permanently and conspicuously affixed in every school-room." Under that sub-section the plaintiffs had an absolute statutory right to determine by their time-table the time at which religious instruction was to be given. The Board of Education have no power to alter that time-table. They must approve or disapprove of it. It is a necessary condition under s. 7 of the Act of 1870 to the maintenance of a school as a public elementary school that it should have a time-table approved by the Board of Education. The plaintiffs had such a time-table in force at the time of the acts complained of. Under s. 7 of the Act of 1902 the managers have the "control" of religious instruction; the local education authority can only give "directions" as to secular instruction, and the time fixed by outside authority decides what are the periods of secular and what of religious instruction. The defendants, as the local education authority, had no authority to alter or to require the alteration of the time-table. So long as it remained in force the plaintiffs were by the joint operation of the Code and s. 97 of the Act of 1870 bound to obey it. Direction No. 2 of the defendants' regulations, providing that secular instruction in all schools should commence not later than 9.45 A.M. and occupy the school hours for the rest of the day, is inconsistent with that time-table, and the plaintiffs could not have complied

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with it without disobeying the time-table. The direction, although purporting to be one dealing with secular instruction, did, in fact, deal with religious instruction, and was headed "Time of Religious Instruction." Its real object was to prevent the children from being taken to church by requiring that religious instruction should be given between 9.5 A.M. and 9.45 A.M. By s. 7, sub-s. 6, of the Act of 1902 the control over religious instruction in non-provided schools is vested in the managers. The direction, therefore, being a direction as to religious education, was ultra vires the defendants and was not binding on the plaintiffs.

As to direction No. 4, requiring that religious instruction should not be given in any place other than the school, the question turns upon the meaning to be given to the word "school" in the Acts and the by-law. The matter of religious instruction being under the control of the managers, when the time for giving such instruction is settled the place in which it is to be given rests entirely with the managers, and is not a matter in which the local authority can intervene. The managers are just as much entitled, it is submitted, to give religious instruction in a church as in the school. If they are to have the control over religious instruction it is essential that they should be entitled to determine the place in which such instruction is to be given. The word "school" is frequently used in the Education Acts to denote the institution, and not the place, as, for example, "certified efficient school": Act of 1876, s. 48: see also Act of 1870, s. 7, sub-s. 4. That direction, therefore, is also ultra vires the defendants.

With regard to the closing of the school, the defendants had no power to do more than to discontinue its maintenance, and anything else they did beyond that was in excess of their powers. In the case of non-provided schools, the only right of entry which the local education authority have is that given them by s. 7, sub-s. 1 (*b*), of the Act of 1902, which empowers them to inspect the school. On March 27, 1905, when the defendants sent their inspector to close the school, they had ceased to maintain it, and therefore had no further power or control over it. Their right to inspect ceased on March 25, 1905, when they

ceased to maintain it, because the school was no longer a public elementary school: Act of 1870, s. 7, sub-s. 4. The inspector, having therefore come to the school for the purpose of closing it, was not there for a legitimate purpose, and therefore committed a trespass, in respect of which the plaintiffs are entitled to nominal damages.

With regard to dismissing the teachers, there is no privity of contract created by s. 7 of the Act of 1902 between a teacher in a non-provided school and the local education authority: *Crocker* v. *Plymouth Corporation* (1); the privity is between the teacher and the managers. The defendants' inspector by closing the school and transferring the teachers caused them to break their contracts with the plaintiffs.

[WARRINGTON J. If a person goes to the servant of another and offers him better terms, is that an actionable wrong?]

Yes, if he thereby induces the servant to break his contract and leave his master's service. Procuring a breach of a contract is an actionable wrong, unless there be justification for interfering with the legal right: *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (2) That case is conclusive on this point.

The whole anxiety of the teachers was occasioned by the defendants' inspector's statement that the school was closed. The effect of what the defendants did was to close the school, to treat the teachers as their own and to transfer them to other schools.

Danckwerts, K.C., and *Sargant*, for the defendants. The plaintiffs cannot rely on the time-table in force in the school in March, 1905. By s. 74 of the Act of 1870 the duty is imposed on the local education authority of making by-laws to secure the attendance of the children at school. Disobedience by the parents to such by-laws is a criminal offence: *Mellor* v. *Denham.* (3) Penalties for their breach may be recovered under the Summary Jurisdiction Acts, and any person can institute a prosecution if an offence has been committed: *Reg.* v. *Stewart* (4); *Back* v. *Holmes.* (5) Further, under s. 7, sub-s. 1 (*a*), of the Education

(1) [1906] 1 K. B. 494.
(2) [1905] A. C. 239, 245, 254.
(3) (1880) 5 Q. B. D. 467.
(4) [1896] 1 Q. B. 300.
(5) (1887) 57 L. J. (M.C.) 37.

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Act, 1902, the managers of a school are bound to carry out any directions of the local education authority as to the secular instruction to be given in the school. And, although the particular regulations in question have a heading referring to religious education, they do in substance deal with secular instruction, and make provisions for this latter instruction not being unduly interfered with by religious instruction. Under these circumstances it was the duty of the plaintiffs so to act that the parents of the children could comply with the defendants' by-laws. They ought, therefore, to have revised their time-table in accordance with the defendants' by-laws and regulations and to have submitted it to His Majesty's inspector for signature, as they were requested to do by the secretary of the defendants' education committee in his letter of December 16, 1904. This, however, they did not do.

Religious instruction in non-provided schools, where the authorities choose to give it, is part of the ordinary curriculum of the school. It is an essential part of the organism of the school: *Attorney-General* v. *West Riding of Yorkshire County Council.* (1) Sect. 7 of the Act of 1902 is not to be read as if clauses (*a*) to (*e*) formed independent affirmative sections of the Act and were then followed by another clause providing that the authority should maintain and keep efficient the school only so long as clauses (*a*) to (*e*) were complied with: *Young* v. *Cuthbert.* (2) The breach of any one of the provisions of s. 7 disentitles the school to maintenance, because the school thereupon ceases to be a public elementary school. Unless the parent withdraws his child from religious instruction the child must remain at the school during the whole time the school remains open. The usual way in which the difficulty of taking children to church is got over is either (1.) by the parent withdrawing the child during the time appointed for religious instruction, in which case the parent may take the child where he chooses; or (2.) by the managers giving holidays on the days on which it is desired to take the children to church, provided that the number of such holidays does not exceed ten days in any one year. The local education authority, having under the Act of 1902 acquired all the powers of the local

(1) [1907] A. C. 29, 42. (2) [1906] 1 Ch. 451, 460.

attendance committees, are bound to report all infractions of restrictions of s. 7 of the Act of 1870. Unless those restrictions are all complied with the school ceases to be a public elementary school.

The defendants did not, and could not, close the school in fact, whatever phrase their inspector may have used. They merely ceased to maintain the school, and said they had a right to do so. It was open to the plaintiffs to carry on the school as a non-provided school on their own account, and, if they chose, to apply to have it certified as an efficient school. The defendants admit that their object in making the directions was to secure that after 9.45 A.M. there should be nothing but secular instruction.

The matters in dispute between the plaintiffs and the defendants are matters under the exclusive jurisdiction of the Board of Education under s. 7, sub-s. 3, of the Act of 1902, and the Board having given their decision, the Court has no jurisdiction to interfere with it, particularly having regard to the fact that the plaintiffs have themselves made a formal appeal to the Board: *Norwich Corporation* v. *Norwich Electric Tramways Co.* (1); *Reg.* v. *Croydon and Norwood Tramways Co.* (2); *Caledonian Ry. Co.* v. *Greenock and Wemyss Bay Ry. Co.* (3) In *Attorney-General* v. *West Riding of Yorkshire County Council* (4) the question of jurisdiction was, by arrangement, not raised. There is no appeal under the Act of 1902 against a decision of the Board of Education, whether that decision be in favour of the local education authority or of the managers. The Board of Education can compel a local education authority to obey their decision ultimately by mandamus: *Attorney-General* v. *West Riding of Yorkshire County Council.* (4)

With regard to the place in which religious instruction is to be given, the instruction must, it is submitted, be given in the school-house, which in the case of a non-provided school is to be provided by the managers. In the Education Acts the word "school" is used sometimes as meaning the school building and sometimes as meaning the institution. Our contention is that,

(1) [1906] 2 K. B. 119.
(2) (1886) 18 Q. B. D. 39.
(3) (1874) L. R. 2 H. L. Sc. 347.
(4) [1907] A. C. 29, 42.

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even where the school is regarded as an institution, it is an institution carried on in a particular place and in particular buildings approved by the Board of Education for the purpose, except as regards certain subjects of instruction, the giving of which elsewhere is specially sanctioned by the Code.

With regard to the claim for trespass, the case has been argued on the assumption that the school was the plaintiffs' school, but that is not the case. The local education authority have a larger pecuniary interest in a non-provided school than the managers. Both parties derive their powers under the Act of 1902, except that the managers have to provide the schoolhouse. In the present case the school is the property of private owners, who are not parties to the action. The local education authority are in occupation and possession of the school as much as or more than the managers.

[WARRINGTON J. I am satisfied that the plaintiffs have not made out that the defendants induced the teachers to break their contracts without justification, and I will not, therefore, trouble you on that point.]

Cripps, K.C., in reply. There are two distinct matters of complaint against the defendants raised in this case—(1.) trespass in closing of the school; and (2.) the withdrawal of maintenance from the school. The Board of Education did not purport to deal with the first matter, and no defence has now been made with regard to it.

[WARRINGTON J. Where is the wrong done to the plaintiffs?]

The inspector was a trespasser ab initio. If a person enters premises under a legal right, and, being there, does a tortious act, he thereby becomes a trespasser ab initio: *Six Carpenters' Case.* (1) The inspector entered the school as inspector, but in closing it and dismissing the teachers he was not acting as inspector.

[WARRINGTON J. There may have been a trespass, but who is entitled to sue in respect of it? I am not satisfied that under the Act of 1902 the managers are in occupation of the school premises.]

It is submitted that they are, and in sole occupation. It was

(1) (1610) 8 Rep. 146a; 1 Sm. L. C. 11th ed. p. 132.

therefore rightly pleaded that the plaintiffs were managers, as that implies occupation. It was suggested on behalf of the defendants that the plaintiffs were in joint occupation of the school premises with the defendants, but that, it is submitted, is not so. It is by reason of their occupation that the managers of non-provided schools are liable under s. 7, sub-s. 1 (*d*), of the Act of 1902 to do repairs. Sect. 7 of that Act has not altered the position of managers as regards occupation from what it was before the Act.

[*Sargant.* The managers are a new body created by the Act of 1902: *Jones* v. *Hughes.* (1)]

It is immaterial whether or not the plaintiffs are the successors of the former managers. They were in occupation of the school-house, and being in occupation they are entitled to maintain an action for trespass. The inspector was acting as agent for the defendants, and if he is a trespasser the defendants are liable for his acts: *Bayley* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (2); *Barwick* v. *English Joint Stock Bank* (3); *The Thetis* (4); *Citizens' Life Assurance Co.* v. *Brown.* (5) Damages are not material to the right of action. The question whether or not a trespass has been committed could never have been one to be determined by the Board of Education under s. 7, sub-s. 3, of the Act of 1902. There is no joint occupation as between the managers and the local education authority in the case of a non-provided school. The only right of the local education authority under s. 7, sub-s. 1, of the Act of 1902 is to inspect.

[*Sargant.* The defendants do not allege that they are in joint occupation with the plaintiffs, but contend that the plaintiffs have not proved such an exclusive possession of the premises as will entitle them to maintain an action of trespass. So far as it is a question of occupation as between the plaintiffs and the defendants, the occupation is that of the defendants under s. 7, sub-s. 1 (*d*).]

If the local education authority were in joint occupation with

(1) [1905] 1 Ch. 180.
(2) (1872) L. R. 7 C. P. 415, 420.
(3) (1867) L. R. 2 Ex. 259, 265.
(4) (1869) L. R. 2 A. & E. 365.
(5) [1904] A. C. 423.

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the managers of the school it would have been unnecessary for the Act by s. 7, sub-s. 1 (*b*), to give them a right to inspect.

Cur. adv. vult.

Feb. 13. WARRINGTON J. The plaintiffs are the managers appointed under the Education Act, 1902, for the purposes of the Marston St. Lawrence public elementary school, in the county of Northamptonshire. The defendants, the Northamptonshire County Council, are, under the same Act, the local education authority for the county. The contest, therefore, is between two public bodies each having functions to perform in reference to elementary education. The plaintiffs claim first—I am not stating the claims in the order in which they occur in the statement of claim—a declaration that they are entitled, and have been from March 25, 1905, to have the Marston St. Lawrence School maintained by the defendants as a non-provided public elementary school in accordance with the Education Acts, 1870 to 1902. Secondly, they claim payment of the sum necessary for the maintenance of the school from March 25, 1905, but it was practically admitted at the Bar that this claim, at any rate in that form, could not be maintained. Thirdly, they claim damages for trespass and for certain illegal acts alleged to have been committed by the defendants and their authorized servants or agents in closing the school and without due justification inducing or procuring the teachers to break their contracts with the plaintiffs.

As to the first head of these claims, the defendants have pleaded that the jurisdiction of the Court is excluded by s. 7 of the Act of 1902. That section, so far as is material for the present purpose, provides that (1.) "The local education authority shall maintain and keep efficient all public elementary schools within their area which are necessary, ... but in the case of a school not provided by them," as in the present case, "only so long as the following conditions and provisions are complied with: (*a*) The managers of the school shall carry out any directions of the local education authority as to the secular instruction to be given in the school, ... but no direction

given under this provision shall be such as to interfere with reasonable facilities for religious instruction during school hours." Sub-s. 3 provides that "If any question arises under this section between the local education authority and the managers of a school not provided by the authority, that question shall be determined by the Board of Education." Inasmuch as the first claim of the plaintiffs itself seeks to enforce by declaration of the Court a right which, if it exists at all, exists by virtue of the section, it would at first sight appear as if the question was clearly one arising under the section, and therefore one which must be determined by the Board of Education. But the plaintiffs say that it is not so, and that when the facts are known it will be seen that the question really arises outside the Act of 1902, and comes under s. 7 of the Elementary Education Act, 1870, because the plaintiffs allege that the direction to which I shall presently refer, and upon which the question turns, is not a direction as to the secular instruction to be given in the school, but is a direction as to religious instruction, and so a direction as to a matter upon which the plaintiffs allege the defendants had no statutory authority to give any direction at all. Sect. 7 of the Act of 1870, so far as is material, provides that "Every elementary school which is conducted in accordance with the following regulations shall be a public elementary school within the meaning of this Act; and every public elementary school shall be conducted in accordance with the following regulations (a copy of which regulations shall be conspicuously put up in every such school), namely." Then follows sub-s. 1, which is commonly known as the conscience clause, and then sub-s. 2, which is the important one in this case: "The time or times during which any religious observance is practised or instruction in religious subjects is given at any meeting of the school shall be either at the beginning or at the end or at the beginning and the end of such meeting, and shall be inserted in a time-table to be approved by the Education Department, and to be kept permanently and conspicuously affixed in every schoolroom; and any scholar may be withdrawn by his parent from such observance or instruction without forfeiting any of the other benefits of the school."

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The Marston St. Lawrence School is a Church of England school, and has been carried on as such for many years, and of course with a time-table under s. 7 of the Act of 1870. At the date material for the purposes of the present action, the time-table was of the following nature: It provided that the school should be opened at 9 A.M.; religious observance and religious instruction was to be from 9 A.M. to 9.55 A.M.; at 9.55 A.M. the registers were to be marked and closed; at 10 A.M. secular instruction was to commence and continue until 12 noon, when school was to be closed and dismissed for the morning. The time-table had, and for many years had had, at the bottom of it the following note, which had been approved by His Majesty's inspector: "On saints' days and holy days registers marked at 9 A.M." The meaning of that was this. In order to earn the parliamentary grant, it is necessary that attendance for secular instruction shall be for a continuous period of two hours, with the authorized interval of five or ten minutes for recreation. If, therefore, the children were to be taken to church at 11 A.M. on saints' days and holy days, which was the custom at this school, secular instruction could not begin at 10 A.M. The meaning, therefore, of that note was that on saints' days and holy days secular instruction was to begin at 9 A.M. and to continue till 11 A.M., and then religious instruction was to occupy the remaining hour, from 11 A.M. to 12 noon; and the practice had been to take the children to church at 11 A.M.

In September, 1904—some time after the coming into operation of the Act of 1902—the local education authority issued a circular of instructions, which has been referred to in these proceedings as "circular 45 N." That circular contained a number of regulations to be observed by the managers and others in reference to the school, and inter alia the following, which is important for the present purpose: "Religious Instruction in Schools:—The following regulations have been adopted by the education committee: . . . . (2.) Time of Religious Instruction.—Secular instruction in all schools shall commence not later than 9.45 A.M., and occupy the school hours for the rest of the day." Although that direction is headed "Time of Religious Instruction," it is plainly, in my judgment, a direction as to

secular instruction. Incidentally it affects the time for religious instruction by fixing the time for secular instruction, but it is really a direction as to secular instruction. Then "(3.) Holidays of Observance.—District sub-committees are empowered to allow the closing of any school in their district for a number of days not exceeding ten in any one year, in addition to the fixed holidays defined by the education committee. This regulation will, it is hoped, meet the wishes of each locality, as, for instance, in the case of difficulties arising from the feast-week in villages, and in the case of days of religious observance which have in some places been uniformly accompanied by a holiday." Then "(4.) Place of Religious Instruction.—In consideration of the answer given in the House of Commons by Sir W. Anson to Mr. Halsey on Friday, June 10 last, religious instruction of children attending an elementary school shall not be given in any place other than the school during the hours in which the school is open, unless it be in connection with the withdrawal of children under the conscience clause." The last part of that regulation requires explanation. It is not quite clear, and it certainly was not clear to me until I was instructed as to the mysteries of the statutory provisions as to education. What it means is this, that parents who desire to have their children sent to church may withdraw them from the school during the hour of religious instruction, and then the children so withdrawn may be taken to church for religious instruction, or elsewhere as their parents desire.

Notwithstanding these directions, on November 1 and 30 and December 21, 1904, being respectively All Saints', St. Andrew's, and St. Thomas' Days, the managers caused secular instruction to begin at 9 A.M., and so far they did not infringe regulation No. 2, but, instead of continuing it till 12 noon, which would be the rest of the school hours, they caused it to be broken off at or about 11 A.M., and took the children to church. If there were nothing else, that was obviously a breach of the direction No. 2. The local education authority were informed of the action of the managers, and warned them of the consequences which would ensue if they continued this practice, and on December 16, 1904, wrote them a letter which, I think,

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is perhaps the most important document in the case. It was written by the secretary of their education committee to Mr. Blencowe, who was the correspondent of the managers, and after referring to the fact that the children had been taken to church on All Souls' Day and St. Andrew's Day, the letter proceeded: "I am to inform you that the education committee must insist upon the observance of its regulations as to religious instruction (see circular 45 N.), and"—and this is the passage which seems to me to be so important—"that the time-table must be revised and submitted to His Majesty's inspector for signature upon his next visit." The managers failed to comply with that direction, and on January 19, 1905, His Majesty's sub-inspector visited the school. At that date the time-table was in the form in which it had been for many years. The sub-inspector, with the authority of the inspector, himself altered the time-table by putting his pen through the note, "On saints' days and holidays registers marked at 9 A.M.," and signed the alteration "Cancelled for His Majesty's inspector, Thomas Harrison, sub-inspector." On March 8, 1905, being Ash Wednesday, the managers again took the children to church at 11 A.M., and on March 25 the local education authority gave effect to the warnings which they had already given to the managers, and refused to continue to maintain the school. They originally refused to maintain it as from March 1, but they subsequently altered that to March 25, so that it may be taken that they refused to continue to maintain the school as from March 25, 1905. On March 27 the managers, through their correspondent, appealed to the Board of Education under the jurisdiction which, it is said by the defendants, the Board possess under s. 7 of the Act of 1902. Mr. Blencowe's letter contained this passage: "I feel sure that the Board of Education would wish to act fairly and justly towards the managers of non-provided schools, and so I appeal with confidence to them against the peremptory measures taken against our school by the local education authority, relying on the right of appeal given to us under s. 7 (3.) of the Act." The Board of Education gave their decision on April 14. I do not read their decision because I am not sitting here as a Court of appeal from the Board, and

I think it is better not to read it, but the effect of it was to confirm the action of the local education authority.

Now, the question arises, Was that decision of the Board given properly under s. 7, sub-s. 3, or rather was the question to be decided one arising under s. 7 of the Act of 1902? In my opinion it clearly was. Taken by itself, direction No. 2 is a direction as to secular instruction. The breach of it by the managers and the refusal by the defendants to maintain the school raised a question under s. 7. But it is said by the plaintiffs that to have complied with the direction so long as the time-table remained what it was, with that note at the foot of it, would have involved a breach of the statutory obligation under which they were by virtue of s. 7 of the Act of 1870, and therefore that the direction was not one given under s. 7 of the Act of 1902, but was really ultra vires the defendants, and that the question was one arising not under the Act of 1902, but under the Act of 1870. That is a point which requires to be dealt with. Mr. Morant, the Secretary of the Board of Education, has been called as a witness on behalf of the defendants, and I know from him that in the opinion of the Board of Education, although the action of His Majesty's sub-inspector in altering the time-table without first communicating with the managers was irregular, yet the Board, if it had been communicated with by the managers, or if the sub-inspector, on finding that the time-table had not been altered in pursuance of the directions of the local education authority, had reported the matter to the Board, would have insisted on the alteration, under the ultimate sanction of withdrawing the parliamentary grant. By refusing to take steps to get the time-table altered the managers, in my opinion, committed a further breach of a direction as to secular education, a direction which was impliedly contained in direction No. 2, because without an alteration of the time-table that direction could not be carried into effect, and was expressly contained in the Board's letter of December 16, 1904, which I have just read, and to which I have said I attach very great importance. That being so, I think the question, whether regarded as one with reference to the time of secular instruction or as one with reference to the time-table, must be considered as

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one wholly arising under s. 7 of the Act of 1902. If that be so, the matter was one which under sub-s. 3 was to be settled by the Board of Education, and the Court has no jurisdiction to deal with it. I do not forget that the expressed object of the local education authority was to prevent the children from being taken away from the school for religious instruction during school hours; but it seems to me that if this object was attained by a direction which they were competent to give under s. 7, their motive is immaterial, and it certainly cannot affect the question of jurisdiction. Having come to this conclusion with reference to the question raised by direction No. 2 in Circular 45 N., it is unnecessary for me to express any opinion as to No. 4, namely, whether No. 4 is ultra vires or not, and, being unnecessary, I think it is undesirable to do so.

As to the other causes of action, the first head of claim is trespass. The facts with reference to that are these: The local education authority having withdrawn the maintenance from the school, thought it right, and I am sure nobody could blame them for so thinking, to make provision, if they could, to ensure the teachers against loss, and accordingly on March 27 their inspector, Mr. Elliott, attended at the school. I have since the arguments carefully looked at the pleadings again, and I do not find that the plaintiffs allege that his entry was a trespass. They tacitly admit that he entered properly as inspector of the local education authority. While at the school he informed the teachers and the children that, in consequence of the withdrawal of support by the local education authority, the school would be closed, and that the local education authority would find employment for the teachers and accommodation for the children elsewhere, and he arranged then and there to send the teachers to certain provided schools, selected by themselves from amongst certain schools the names of which were submitted to them, and he informed the children that the closing of the school would not mean a holiday to them, but that they would have to attend school at a neighbouring school, being the nearest one within the statutory distance. He also made an entry in the log book which was as follows; "27th March, 1905: The school was closed this morning, the Northants Education

Committee having transferred the teachers." In thus treating the school as closed, he came, I think, to a hasty conclusion, forgetting that it was competent to the managers, if they could raise the necessary funds, to carry on the school as a certified efficient school which the children might attend without breach of the by-laws enforcing compulsory attendance at school. The vicar was not present on Mr. Elliott's first visit, but Mr. Elliott proceeded to the vicarage and informed him what had taken place. They then went together to the school, when Mr. Elliott practically repeated to the teachers and children what he had already said, and the vicar protested against what was said. In fact, within a day or two afterwards the managers obtained the necessary financial support and re-opened the school with other teachers.

Now the plaintiffs' case on this head is this: They contend that, assuming Mr. Elliott's entry was originally lawful, his subsequent conduct was an abuse of the authority he possessed as inspector and rendered his entry a trespass ab initio, for which they are entitled to recover damages. I think the question which lies at the root of this claim is whether the managers were in possession of the school so as to entitle them to maintain an action for trespass. It is important on this point to turn to the pleadings. The only material allegations as to this part of the case are those contained in paragraphs 1 and 2 of the statement of claim. Paragraph 1 alleges that the plaintiffs are the managers for the purposes of the Education Act, 1902, of the school in question. Paragraph 2 alleges, so far as is material, that the school premises "are the property of private owners, with whose permission they were from the year 1847 onwards used by a body of managers as a national school in connection with the Church of England. In the year 1877 the school was put under Government inspection, and became a public elementary school within the meaning of the Elementary Education Acts. After the year 1877 the said private owners continued to allow the use of the said school premises voluntarily and without rent for the purposes of a public elementary school." Putting it shortly, therefore, the only allegation of possession upon the pleadings is such possession, if any, as the managers

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have by virtue of their position as managers appointed under the Act of 1902. Is their position under that Act such that they have possession of the school in the legal sense, namely, such possession as would enable them to maintain an action for trespass? To answer this question it is necessary to look at the Act of 1902. Sect. 6, sub-s. 2, provides that "All public elementary schools not provided by the local education authority shall, in place of the existing managers, have a body of managers consisting of a number of foundation managers not exceeding four, appointed as provided by this Act, together with a number of managers not exceeding two, appointed" by certain public bodies. That body of managers is what it is called, a body of managers, and nothing is said as to their ownership, occupation, or possession of the school. Then s. 7, sub-s. 1, provides for the maintenance of the schools: clause (*a*) of that sub-section provides for directions as to secular education; clause (*b*) empowers the local authority to inspect the school; clause (*c*) provides for consent to the appointment and dismissal of teachers; and then clause (*d*) is as follows: "The managers of the school shall provide the school-house free of any charge, except for the teacher's dwelling-house (if any), to the local education authority"—that means "free of charge to the local education authority," and I may read it—"shall provide the school-house for use as a public elementary school, and shall, out of funds provided by them, keep the school-house in good repair, and make such alterations and improvements in the buildings as may be reasonably required by the local education authority," and then follows a provision as to fair wear and tear. Then clause (*e*) is: "The managers of the school shall, if the local education authority have no suitable accommodation in schools provided by them, allow that authority to use any room in the school-house out of school hours free of charge for any educational purpose, but this obligation shall not extend to more than three days in a week." Sub-s. 2 of s. 7 provides that "The managers of a school maintained but not provided by the local education authority, in respect of the use by them of the school furniture out of school hours, and the local education authority, in respect of the

use by them of any room in the school-house out of school hours, shall be liable to make good any damage caused to the furniture or the room, as the case may be, by reason of that use (other than damage arising from fair wear and tear); and the managers shall take care that, after the use of a room in the school-house by them, the room is left in a proper condition for school purposes." The effect of those provisions of the Act of 1902 seems to me to be that the Act assumes the provision of the school and says nothing about the ownership; and I think the true conclusion to be drawn from the provisions is that the managers have merely certain statutory rights over such school-house as is provided by the owner, whether under a trust deed or, as in the present case, a private owner, who voluntarily, to use the expression in the statement of claim, allows it to be used for the purposes of the school. They merely have certain statutory rights over the building and only such rights over the building while devoted by the owner to the purposes of the school as will enable them to perform their statutory duties. Possession, in the strict legal sense, such as is required to maintain an action for trespass, is not, in my opinion, necessary in order to enable them to perform those duties, and remains in the owner; for example, have they such possession under the Act that they could exclude the owner? I can see nothing whatever in the Act which would enable them to treat the owner as a trespasser, if, for some purpose of his own, he desired to, and did in fact, visit the school. In my opinion, therefore, on this statement of claim the plaintiffs have not alleged or proved a possession sufficient to support an action of trespass. Whether they might have pleaded and proved a special arrangement with the owner by which they have had possession, I do not know. I can only deal with the pleadings as they stand, and upon them I think evidence of a special arrangement giving them any possession other than that which they had by virtue of the Act of 1902 would necessarily have to be rejected. The conclusion I have come to in this respect would be a sufficient answer to the claim for trespass, but I desire to say that I must not be taken to be of opinion that, even if the plaintiffs had been in possession, the conduct of Mr. Elliott was a wrongful

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act, strictly and in a legal sense, which would convert a lawful entry into a trespass.

As to the claim for damages for inducing the teachers to break their contracts, I find on the facts that there was no such inducement held out. Realizing the loss that the teachers would suffer if employment was not found for them, the local education authority offered them places elsewhere. In this, I think, they were reasonably justified, though, as I have already said, I think Mr. Elliott too hastily assumed that the school would not continue.

The result is that the action fails, and there must be judgment for the defendants, with costs.

Solicitors: *Withers, Bensons, Withers & Davies, for H. W. Chell, Bury; Sharpe, Parker, Prichards, Barham & Lawford, for H. A. Millington, Northampton.*

W. I. C.

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In re BRITISH POWER TRACTION AND LIGHTING COMPANY, LIMITED.

HALIFAX JOINT STOCK BANKING COMPANY, LIMITED *v.* BRITISH POWER TRACTION AND LIGHTING COMPANY, LIMITED (No. 2).

[1902 B. 3355.]

Company—Receiver and Manager—Borrowing Powers—Authority to borrow limited Sum for general Purposes of the Business—Limit exceeded—Indemnity—Creditors of Manager—Debenture-holders—Priority.

Orders were made in a debenture-holders' action appointing a receiver and manager, and authorizing him to borrow 3000*l.* for the general purposes of the business, this sum to be a first charge on the assets. The company was ordered to be wound up. The manager carried on the business, borrowed 3000*l.* from a bank, incurred other debts, and overdrew his account with the bank to the extent of 1500*l.* beyond the 3000*l.*, but made no further application for leave to raise money. He retired from his office, and the debenture-holders applied for a declaration that he was not entitled to any indemnity out of the assets of the company in respect of liabilities incurred beyond the 3000*l.* His creditors claimed that he was entitled to an indemnity, and that they ought to that extent

to be paid out of the assets. The application came before Warrington J., who held that the order authorizing the receiver and manager to borrow a limited sum for the general purposes of the business had not deprived him of his right to be indemnified out of the assets; that, if without any application to the Court, he had incurred further liabilities, he was only entitled to be indemnified in respect of them so far as he could shew that, having regard to all the circumstances, he was justified in incurring them without leave; that this must be separately determined in each case; and that it would not be enough for him to shew that the further liabilities had been incurred bona fide and in the ordinary course of business.

The case is reported [1906] 1 Ch. 497.

The matter then went back to chambers on inquiries which had been directed by a previous order, and questions now came before the Court whether the receiver was entitled to be indemnified (1.) in respect of bodies supplied for motor-cars which had been ordered by customers either before or after his appointment; (2.) bodies supplied to him for cars which had been prepared for a motor show; (3.) rent of business premises; and (4.) the 1500*l.* overdrawn with the bank:—

Held, that inasmuch as the receiver had reasonable ground for believing that he would be able to discharge the liabilities out of the purchase-moneys of the cars, and it would not have been practicable to apply to the Court, he ought to be indemnified in respect of (1.) and (3.); that the motor bodies supplied for the show were ordered as a speculation, so there should be no indemnity in respect of (2.); that, although the 1500*l.* overdraft had all been spent on payments which were necessarily made to keep the business going, there was no reason why the receiver should not have applied to the Court for leave to make these payments and he was therefore not entitled to an indemnity in respect of (4.).

ADJOURNED INQUIRY.

The facts in this case were stated by Warrington J. as follows:—

This is a debenture-holders' action commenced in the year 1902. On August 27, 1902, Herbert Watkins was appointed by the Court receiver and manager of the company's business, his term of management being limited to December 31, 1902. By an order dated September 4, 1902, liberty was given to him to raise by mortgage of the company's assets a sum not exceeding 3000*l.*, to be a first charge on those assets. On the same day a petition was presented for the winding-up of the company, on which a winding-up order was made on December 16. On December 15 his term of management was extended until January 13, 1903, and on January 14 it was extended for a further period of three months. On February 11, 1903, an order was made stating that

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Watkins desired to retire and appointing a new receiver in his place.

On July 19, 1904, an order was made directing the following inquiries: "(1.) What creditors there are in respect of debts and liabilities incurred by Herbert Watkins as the receiver and manager appointed in this action by the said order dated August 27, 1902, and what are the amounts due to such creditors respectively. (2.) Whether the said Herbert Watkins as such receiver and manager is entitled to be indemnified out of the assets of the defendant company in respect of the said debts and liabilities or any of them, and, if so, to what extent."

Upon proceeding with these inquiries the plaintiffs raised the question whether Watkins was entitled to any indemnity at all, having regard to the authority given him to borrow money for the general purposes of the business. This came before the Court on February 6, 1906, and by an order of that date it was declared "that Herbert Watkins, the late receiver and manager, in this action appointed by the said order dated August 27, 1902, is entitled to be indemnified out of the assets of the defendant company in respect of those debts and liabilities only (over and above the permitted overdraft of 3000*l.* the amount borrowed from the said Messrs. Barclay & Co., Limited, by the said receiver and manager pursuant to the said orders dated August 28 and September 4, 1902), as to which he shall satisfy the judge that having regard to all the circumstances under which the same were respectively incurred, he was justified in incurring them without first obtaining the leave of the judge."

The case is reported. (1)

The matter then went back to chambers on the inquiries directed by the order of July 19, 1904; and it was arranged before the registrar that the questions of the principle on which he should deal with these claims should be submitted to the Court for determination before the certificate.

Among the creditors of Watkins who claim that he was entitled to be indemnified against their claims, and that they are entitled to be paid out of the assets by virtue of and to the extent of his

(1) [1906] 1 Ch. 497.

right of indemnity, are the Mulliner Motor Body Company and Barclay's Bank.

The position of the two claimants is distinct, but some of the facts are common to both, and the question in each case is the same, viz., whether on the lines laid down in the order of February 6, 1906, Watkins is entitled to be indemnified to any and what extent against their claims. I will deal with the Mulliner Company first.

The British Power Traction and Lighting Company were manufacturers and vendors of motor-cars known as the "Gardner Serpollet" cars. They were not in the habit of keeping cars in stock, but on receiving orders from customers they manufactured the chassis under licence from the Gardner Serpollet Syndicate, and obtained the bodies and tyres from the Mulliner Company. On receiving the purchase-moneys for the cars from the customers, the company had to pay thereout royalties and commission to the syndicate, retaining the residue for their own benefit. At the date of the receivership order there were current a number of orders for cars which were in course of manufacture, the bodies and tyres for which had been ordered from the Mulliner Company, but had not been delivered or paid for. The receiver, in order to enable him to complete the cars and receive the purchase-money, was compelled to give, and did give, orders in his own name to the Mulliner Company for the bodies previously ordered by the company, and in some cases (having himself obtained orders from customers) he gave the Mulliner Company the necessary orders for the bodies. As to these cars, whether ordered from the company or from the receiver, they were either completed before he retired, and the purchase-moneys received by him, or the contract for them was still current on the appointment of the new receiver, who thus obtained the benefit of them on behalf of the debenture-holders.

In addition to the cars thus made and disposed of in the ordinary course of business, the receiver thought it desirable to prepare a number of cars for a show in the spring of 1903, with the hope of thus improving the company's business and obtaining further orders. He accordingly ordered from the Mulliner

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Company nineteen bodies for cars. These had not been delivered when the new receiver was appointed. He refused to take delivery, and the Mulliner Company claim a large sum (891*l.*) in respect of this transaction.

The Mulliner Company also let to the receiver at a monthly rent certain premises of theirs which were useful to him, and a part of their claim consists of arrears of such rent.

The 3000*l.* which the receiver was authorized to borrow was obtained by an overdraft with Barclay's Bank. This overdraft was from time to time exceeded, the excess on December 12, 1902, the date of the affidavit on which he made his first application for extension of time, being therein stated to be 1200*l.* The present claim of the bank is in respect of the excess overdraft at the date of his retirement. In an affidavit filed in support of the application for leave to borrow it was stated:—

(4.) "The company has on hand a large number of cars which it is unable to complete for want of certain component parts. There are a number of cars ordered by customers and waiting for tyres or bodies. The makers of bodies and tyres refuse to deliver the bodies and tyres unless the amount due to them for tyres and bodies already delivered is paid or some guarantee given that if they deliver the tyres and bodies in hand they will be paid for them. I estimate the amount due for tyres and bodies now under order and practically ready for delivery to be about 800*l.*, on receipt of which I estimate we can complete and deliver within one month cars for the amount of 3000*l.* or thereabouts."

On these facts the inquiry was adjourned to the Court that the question of principle might be decided.

Cave, K.C., and *H. Lindon Riley*, for the Mulliner Company. We only have to shew that in acting as he did without obtaining the sanction of the Court the receiver was acting prudently and in good faith. On each occasion when he became liable to us for goods ordered the liability was a proper one for him to incur; the orders had to be given in order to keep the business going and he was practically certain of selling the cars at a profit. It is true that he ought to have paid for the goods out of profits,

but the fact that he did not do so makes no difference to his right to an indemnity. The question turns on the propriety of the order at the time when it was given. The same considerations apply to the payment of rent. Even if he did not apply the profits properly he has not lost his right of indemnity. Imposing a limit on borrowing does not have the effect of forbidding the receiver to incur debts. The 3000*l.* was simply working cash capital; it was not the limit of his borrowing powers.

Buckmaster, K.C., and *Hon. Frank Russell*, for Messrs. Barclay & Co. The whole of this sum of 1500*l.* was overdrawn for the purpose of paying for things such as wages and rates which were necessary to the carrying on of the business. The extension of the receiver's period of management was an authority to him to make such payments; for the Court knew at that time that there was already an overdraft beyond the 3000*l.* The receiver applied on that footing and obtained an extension of time without any limit of borrowing power; so he was in the same position as if there had never been any limit. If the business had proved a success he would have been allowed his indemnity without any question. The fact that it was a failure is immaterial. If he had asked the Court for leave to borrow more money the request would not have been refused. The business must have been stopped if wages had not been paid: a refusal would have been inconsistent with the order to carry on the business. He made profits at one time, and it will be assumed that they were appropriated to the payment of his debts in order of date under *Clayton's Case*. (1) Thus the account shews that all the payments for which the 1500*l.* was borrowed were made after the orders granting him an extension of time. This is not really a question whether the receiver was entitled to borrow from us, but whether he was justified in making these payments. We submit that he was justified in doing so and is entitled to be indemnified out of the assets. Then we claim the right to stand in his shoes. His indemnity is our only security for the overdraft beyond the 3000*l.*

Norton, K.C., and *Percy Wheeler*, for the debenture-holders. Where a limit has been fixed by the Court to the borrowing

(1) (1816) 1 Mer. 572, 604, 608.

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power of a receiver he is not entitled to be indemnified for money borrowed beyond that limit: *In re Langham.* (1) Here the receiver got in enough profits to cover all these payments, and was not justified in borrowing anything. He ought to have paid all the Mulliner Company's claims out of profits, and he cannot be indemnified in respect of them. There was no reason why he should not have applied for leave. The bank's claim is simply for money lent, and depends on the receiver's power to borrow. Most of the payments on which the 1500*l.* was spent were made before the order extending his period of management, so no power to borrow further can be inferred. There was no reason why he should not have applied to the Court for leave to borrow.

Cave, K.C., and *Buckmaster, K.C.*, in reply.

Cur. adv. vult.

Feb. 14. WARRINGTON J. stated the facts, and continued:— The total amount of the liability for goods ordered of the Mulliner Company, exclusive of the nineteen bodies to which I have referred, was 3180*l.* 15*s.*, and for rent 97*l.* 11*s.* 8*d.*, making together 3278*l.* 6*s.* 8*d.* This was reduced by payment on account to 671*l.* 0*s.* 3*d.* The claim is under three heads: (1.) 573*l.* 8*s.* 7*d.* for goods supplied; (2.) 97*l.* 11*s.* 8*d.* for rent; (3.) 891*l.* in respect of the show cars.

With regard to the first head, I think the receiver is entitled to be indemnified. The circumstances to be regarded are those which existed at the time the liabilities were incurred. Now at this time it appears that the receiver had reasonable grounds for the belief that inasmuch as the cars were for actual purchasers, he would be in a position out of the purchase-money to discharge the liability he had incurred, and I do not think it would have been practicable in a business sense either to reserve a sufficient part of the 3000*l.* or to make an application to the Court before giving the necessary orders. Subject, therefore, to questions of detail, I propose to direct the registrar to admit this part of the Mulliner Company's claim. It does

(1) (1847) 2 Ph. 299.

not follow that the whole of this will be paid out of the assets, but they will be entitled to rank for the amount allowed with other claimants against the net amount of the indemnity allowed to the receiver.

I think the rent stands on the same footing. It is said this ought not to have been allowed to get into arrear; but in my judgment he was reasonably justified in this, as in the case I have just dealt with, in expecting that the purchase-money for the cars would put him in funds to discharge this liability.

I cannot take the same view with regard to the cars ordered for the show. It may have been a prudent thing in the interests of the debenture-holders to embark in a speculation of the kind with the object of increasing the value of the business; but it was none the less a speculation, and ought not to have been undertaken without the specific leave of the Court. The claim for the 891*l.* must, therefore, be disallowed.

Now, as to the claim of Barclay's Bank. It has been contended that the excess of the overdraft above the 3000*l.* should be treated as an unauthorized borrowing and the claim in respect thereof disallowed on that ground. I cannot take that view; it is in my opinion immaterial whether the receiver made the payments, which have occasioned the overdraft, out of moneys of his own already in hand, or out of moneys obtained by pledging his credit. The real question is whether, having regard to the powers given to him to borrow, he was justified in making the payments when he had no money in hand and without coming to the Court to obtain leave to raise the money by borrowing on the security of the assets. The items which go to make up the claim may be stated to be, speaking generally, payments which were necessarily made if the business was to be carried on, and it has been strongly urged that the Court, in continuing the receiver as manager, impliedly authorized him to make these payments, being informed, as it was by the affidavit of December 12, that the authorized overdraft was already exceeded by 1200*l.* Looking, however, at this affidavit and at that of January 12, I think the Court was led to believe that the overdraft would shortly be reduced to such an extent that there would be no necessity for a further credit. I can see no sufficient

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reason why, on December 15, when the application for further extension came before the judge, the receiver should not have asked for his sanction to further borrowing to meet the payments in question, if in fact any further credit for this purpose was necessary. The present excess overdraft by the application of the doctrine of appropriation would appear to be made up of payments since that date. The result is that, in my opinion, in this case it is not shewn that the receiver was justified in making these payments otherwise than out of money in hand, without first obtaining leave, and the claim for indemnity in this respect must be rejected.

I shall therefore direct the registrar to include amongst the items on the credit side of the account necessary for ascertaining the amount of the receiver's claim the amounts due to the Mulliner Company as mentioned above, but not Barclay's overdraft beyond the 3000*l.* The costs of the plaintiffs of this adjournment will be their costs in the action. The costs of the Mulliner Company will be added to their claim. The bank can have no costs.

Solicitors: *Tippetts, for J. W. Wall, Bootle, Lancashire; Jaques & Co., for Dickons & Aked, Halifax; Howe & Rake, for Lucas, Hutchinson & Meek, Darlington.*

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Deed—Misrepresentation as to Contents—Plea of Non est factum—Validity—Mortgage—Execution.

A plea of non est factum is not proved by evidence of misrepresentation as to the contents of the deed where the person executing the deed knew that it dealt with the property to which it related.

The defendant, who was formerly the managing clerk to one H., a solicitor, acted as his nominee in a building speculation relating to the E. property, of which H. was owner. Shortly after leaving H.'s employment he was requested by H. to execute certain deeds, and on asking what those deeds were he was told by H., in whom he had complete confidence, that they were deeds transferring the E. property. The defendant thereupon signed them. One of the deeds so signed was a mortgage between the defendant, as mortgagor, of the one part and W. of the other part, and contained the usual covenant by the mortgagor for payment of principal and interest. In an action by the transferee of the mortgage for payment of the principal debt and interest, the defendant pleaded that the deed was not his deed, but was signed by him in consequence of a misrepresentation by H. as to its contents:—

Held, that the misrepresentation being only as to the contents of the deed known by the defendant to deal with the property, the plea of non est factum failed, and that the defendant was liable on the covenant.

Foster v. *Mackinnon*, (1869) L. R. 4 C. P. 704, distinguished.

National Provincial Bank of England v. *Jackson*, (1886) 33 Ch. D. 1, followed.

ACTION.

This was an action by the plaintiff, Miss Helen Viola Howatson, to recover payment of a sum of 800*l.*, being the balance of a sum of 1000*l.*, secured by a mortgage dated June 2, 1899, and made between the defendant G. E. Webb of the one part and W. P. Whitaker of the other part, of which the plaintiff was the transferee.

The defendant Webb by his defence pleaded non est factum, and the only point upon which the case calls for a report is whether, in the circumstances of the case, that plea could be successfully maintained.

The following statement of the facts is taken from the

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judgment of Warrington J.: "W. T. G. Hooper was a solicitor, and at all material times was in practice as a solicitor. He had as managing clerk the defendant Webb. Hooper was engaged in certain building speculations, and in particular in respect of land at Edmonton. For the purpose of that speculation leases of building plots were taken in the name of the defendant Webb, who was a mere nominee of and trustee for Hooper, and had no beneficial interest in the property. In 1898 Webb left the employment of Hooper. At or about that time Hooper had a client named W. P. Whitaker, who had recently attained his majority, and in the early part of 1899 Hooper had in his hands about 1200*l.* of Whitaker's money. In the course of the early part of the year 1899 certain correspondence took place between Hooper and Whitaker, the result of which may be shortly stated to be that Hooper informed Whitaker that he was investing the money in his hands on mortgage securities. When Webb left Hooper's service Hooper said to him: 'Now of course you will have to transfer the Edmonton property to me, as you are leaving my service,' or something to that effect. I think that was in answer to a suggestion of Webb that as he was leaving he supposed he had better transfer. Nothing more happened in that year, but on June 2, 1899, when Hooper wanted to pretend to invest the money of Whitaker which he had in his hands on mortgage, he sent for Webb, and what was said on that occasion is, I think, of great importance. I have Webb's own statement only (though Hooper is not dead), so that it is not a case of one man's statement against that of another, but I have only the statement of one man, and accordingly I must weigh it very carefully; but I think that I may go to this extent and say I have absolute confidence in Webb's statement. He was, I think, telling the truth and the whole truth. What he said was this: Hooper communicated with him by telephone and asked him to come over and sign some deeds. Webb asked 'What deeds?' Hooper's answer was, 'Transferring the Edmonton property.' Webb went over to Hooper's office the same day, arriving there about lunch time. On his arrival Hooper came out of his private room and greeted Webb with 'Oh, you have come to sign the deeds.' He was, or seemed to be, in a great hurry, and said 'Hurry up

and come and join me at lunch.' Webb asked 'what the deeds were.' Hooper's answer was, 'They are just deeds transferring that property,' meaning the Edmonton property. Hooper then went out. Webb said that his impression was that he said 'They are just deeds transferring that property to me'; but I cannot accept that which was a mere impression, and so I must rely upon the statement being 'just transferring that property.' Hooper having left, Webb signed a number of deeds which had been left open for signature upon a table in the outer office, Crabbe, Hooper's clerk, taking each deed away as he signed it, and afterwards attesting them. Amongst the deeds so signed was a mortgage dated June 2, 1899, and made between Webb (thereinafter called the mortgagor) of the one part and Whitaker (thereinafter called the mortgagee) of the other part. Webb never saw the back of that deed, which was indorsed in large letters 'Mortgage.' Such mortgage recited a lease of certain building plots at Edmonton as having been granted to the mortgagor, and that the mortgagee had agreed to lend the mortgagor 1000*l.* on the security of that property, and it was witnessed that in consideration of the sum of 1000*l.* paid to the mortgagor by the mortgagee, the receipt whereof the mortgagor thereby acknowledged, the mortgagor covenanted to pay the principal sum and interest in the usual way, and demised the premises by way of mortgage as therein expressed. Having executed that deed, Webb heard nothing more of the matter until February 2, 1906, when he received a notice that Miss Howatson had become the transferee of the mortgage and requiring him to pay the principal sum due thereon. The deed was, in fact, retained by Hooper for some considerable time, and was ultimately sent to Whitaker. In the meantime certain sums were paid off. The deed contained two indorsements, one initialled by Hooper himself and the other by Crabbe, with Hooper's initials and a little 'c' underneath, acknowledging the payment off of two sums making together 150*l.* There had also been another payment off of 50*l.*, making a total of 200*l.* No interest was ever paid by Webb. The evidence is that the interest was paid by Hooper to Whitaker, and that the sums paid off were paid by him. On October 23, 1902, Whitaker

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transferred the benefit of the mortgage to Miss Howatson in consideration of 800*l.*, that being the amount then due on the security of the mortgage. It is not disputed that Miss Howatson paid the 800*l.* I ought to say that if any solicitor acted for Miss Howatson it was Hooper."

The defendant Webb by his defence alleged (inter alia) that the mortgage of June 2, 1899, was not his deed; that it was never agreed between him and Whitaker that Whitaker should lend him 1000*l.* or any other sum, or that the defendant should execute the alleged mortgage or any mortgage to secure the repayment thereof; that no money was in fact paid by or on behalf of Whitaker to the defendant, nor was any other consideration given to Webb in consideration of the execution by him of the alleged mortgage. He further alleged that he executed the alleged mortgage on a false representation and under a total mistake as to its nature and contents, and in the bona fide belief that he was executing an instrument of a wholly different kind.

By his counter-claim the defendant counter-claimed, as against the plaintiff, Whitaker and Hooper (inter alia)—(1.) a declaration that the mortgage was void, or, alternatively, void as to the defendant's personal covenants therein contained; and (2.) delivery up of the mortgage deed to be cancelled, or, alternatively, that the same might be rectified by striking out the defendant's personal covenants therein contained or otherwise exonerating him from personal liability under or in respect of such covenants: as against the plaintiff (3.) an injunction restraining her from assigning the benefit of the mortgage or of the debt thereby purported to be secured, or from doing any act whereby the mortgage debt might become vested in any other person on the faith of the execution by the defendant of the mortgage; and as against Whitaker and Hooper (4.) a declaration that the defendant was entitled to be indemnified in respect of his liability (if any) under the mortgage, and payment of all sums that might be due from the defendant to the plaintiff thereunder.

Hooper did not appear, and was not represented at the trial.

Norton, K.C., and *Wright Taylor*, for the plaintiff. We have proved the execution of the deed.

Rowden, K.C., and *Herbert Jacobs*, for the defendant. The defendant was induced by the misrepresentations of Hooper to believe that the deed he was signing was merely a transfer to Hooper of the Edmonton property, whereas it was, in fact, a mortgage by the defendant himself of that property. He was therefore misled as to its actual contents, and the deed therefore does not bind him: *Foster* v. *Mackinnon* (1); *Vorley* v. *Cooke* (2); *Thoroughgood's Case* (3); Norton on Deeds, p. 4. It may be contended that there must be an actual misstatement as to the contents of the deed; but it is submitted that if a person puts another in such a position that he will be misled, that in itself is sufficient to enable the latter to support a plea of non est factum.

The present case is distinguishable from *National Provincial Bank of England* v. *Jackson* (4) and *Hunter* v. *Walters* (5), on the ground that in neither of those cases was there any misleading statement made as to the effect of the documents.

[WARRINGTON J. Is there any case in which the question raised by Mellish L.J. in *Hunter* v. *Walters* (6) has been dealt with?]

In *King* v. *Smith* (7) Farwell J. refers to it, but does not decide it.

Norton, K.C., and *Wright Taylor*, for the plaintiff. If the law be that inaccurate statements as to the contents of a deed make it void, no inaccurate statement was made in the present case. What Hooper said to the defendant was perfectly accurate, so far as it went. There was no misstatement as to the effect of the deed. The defendant was told that it was a deed transferring the Edmonton property, and the deed did in fact do so.

[WARRINGTON J. Mere ignorance as to the nature of a deed, unless brought about by the misstatements of the person inducing the defendant to sign, is not sufficient to support a plea of non est factum.]

(1) L. R. 4 C. P. 704.
(2) (1857) 1 Giff. 230.
(3) (1582) 2 Rep. 9a.
(4) 33 Ch. D. 1.
(5) (1871) L. R. 7 Ch. 75.
(6) L. R. 7 Ch. 87
(7) [1900] 2 Ch. 425.

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In any event mere non-statement is not sufficient; the defendant must be told that the deed does not contain something which it does in fact contain, or that it does contain something which it in fact does not contain. But it is not the law that inaccurate statements as to the contents of a deed avoid the deed. A deed is binding if the person executing it knows that it relates in some way to the property to which it does in fact relate, although he may be misled as to its contents. To enable a defendant to succeed on the plea of non est factum the deed must be of a different nature and character from that which it is represented to be.

In *Thoroughgood's Case* (1) there was a positive misstatement of the nature and character of the deed. In *Hunter* v. *Walters* (2), *National Provincial Bank of England* v. *Jackson* (3), *Lloyds Bank* v. *Bullock* (4) and *King* v. *Smith* (5) the deeds were held binding although the persons executing them were misled as to their contents, because they knew that they were deeds relating to the property to which they did relate.

[WARRINGTON J. In *King* v. *Smith* (5) there was no misrepresentation. It was the case of a man signing a deed without knowing what it was.]

The misstatement in that case was that it was necessary for the plaintiff to execute the deed, whereas in fact there was no necessity for him to execute any deed, as he was not in fact borrowing any money.

J. S. Green, for Whitaker. The present question does not concern Whitaker.

Rowden, K.C., in reply.

[WARRINGTON J. Can I divide this deed and say that the part of it which relates to the covenant for payment of principal and interest is void as being non est factum?]

It would be a strong thing to hold that *Foster* v. *Mackinnon* (6) does not apply. The rule there laid down was that if the person executing a deed believes it to be one of a different class of deeds to that which it is in fact, the plea of non est factum will apply.

(1) 2 Rep. 9a.
(2) L. R. 7 Ch. 75.
(3) 33 Ch. D. 1.
(4) [1896] 2 Ch. 192, 196.
(5) [1900] 2 Ch. 425.
(6) L. R. 4 C. P. 704.

Here the deed which the defendant signed was one of a different class of deeds to that which Hooper represented it to be, and the defendant is therefore entitled to rely on his plea of non est factum.

WARRINGTON J. The question in this case is which of two innocent parties is to suffer for the roguery of a third party, The plaintiff Miss Howatson sues the defendant Webb on a covenant to pay 1000*l.*, now reduced to 800*l.*, under a mortgage dated June 2, 1899, and made between the defendant Webb of the one part and W. P. Whitaker of the other part, the benefit of which covenant was, by a deed of transfer dated October 23, 1902, transferred by Whitaker to the plaintiff, and notice of that transfer was given by the plaintiff to Webb on February 2, 1906. The defence set up by Webb is that the deed is not his deed, and he further alleges that, even if the deed is his deed, he is entitled to prove that, as between himself and the plaintiff, no money in fact was advanced by Whitaker to him and that no money was due by him to Whitaker, and, therefore, that the plaintiff, who can only sue if Whitaker could have sued, cannot recover anything under the covenant. He further alleges that the plaintiff cannot set up any equity superior to Whitaker's rights, because she must, on the doctrine of constructive notice, be taken to have known that there was something wrong with the mortgage deed. That is the general nature of the defence. [His Lordship then stated the facts of the case as above set out, and, after dealing with and disposing of other defences raised by the defendant in his defence, continued:—]

I come, then, lastly, to the plea which is the most important and the most interesting to lawyers—the plea of non est factum, that is, that the deed is void. Can that plea, in the circumstances of this case, be supported? First, what is the law? I need not go back to *Thoroughgood's Case* (1), because there have been more modern statements of the law in recent cases. The earliest of these is *Foster* v. *Mackinnon*. (2) The facts there were these: The defendant had been induced to put his name upon the back of a bill of exchange, making himself liable as indorser, on the

(1) 2 Rep. 9a.

(2) L. R. 4 C. P. 704.

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fraudulent representation of the acceptor that he was signing a guarantee. The bill got into the hands of a bona fide holder for value, who sued the defendant as indorser, and the result of the action was that the defendant, having signed the document without knowing it was a bill and under the belief that it was a guarantee, and not having been guilty of any negligence in so signing it, was held not liable on the indorsement. The important fact there to be observed is that the misrepresentation on the faith of which the defendant acted was a misrepresentation as to the nature and character of the document he was signing. There was no misrepresentation as to the amount secured. Nor was there a misrepresentation as to the character in which he was putting his name to a negotiable instrument, namely, that he was signing as indorser when in fact he was signing as acceptor. The misrepresentation was as to the character of the document. His mind was directed to one thing, and what he put his hand to was a document of an altogether different character. Byles J., in giving judgment, says (1): "It seems plain, on principle and on authority, that, if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read" —so he extends the proposition to one who forbears to read as well as to one who cannot read—"has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then, at least if there be no negligence, the signature so obtained is of no force. And it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended." I pause there for a moment to remark that it seems to me to be essential to the proposition which is there stated that the contract which the signer means to execute should be of a nature entirely different from the contract in dispute. It will not be contended that if, in reading over a contract to a blind or illiterate

(1) L. R. 4 C. P. 711.

person, the reader merely omits or misstates some material clause, the contract is altogether void. It may be voidable or it may be a subject for rectification, but it is not void. It is true that later in the judgment there are some expressions which would appear to carry the rule further than the passage I have read. After referring to *Thoroughgood's Case* (1)—a case where, stating it shortly, the document signed by the plaintiff was of a totally different character from what he was told it was, viz., a conveyance of his own property, instead of, as he was told, a release of certain arrears of an annuity due to him—Byles J. continues: "But the position that, if a grantor or covenantor be deceived or misled as to the *actual contents* of the deed, the deed does not bind him, is supported by many authorities." That passage is a little ambiguous, and I think must be read in connection with the passage with which he opened his judgment. He thus sums up (2): "The defendant never intended to sign that contract, or any such contract. He never intended to put his name to any instrument that then was or thereafter might become negotiable. He was deceived, not merely as to the legal effect, but as to the *actual contents* of the instrument." Reading that with reference to the first passage I have quoted I think he means "deceived as to the actual contents" as expressing the nature and character of the document. Then I have had no case cited which carries the plea further than that a misrepresentation as to the nature and character of the document avoids it.

The next case cited was *Hunter* v. *Walters* (3), and I am referring to that case, not as a decision in favour of the defendant, but to see whether it contains a dictum that it is enough if the defendant is able to prove misrepresentation as to the effect, although there is no misrepresentation as to the nature and character, of the document. There one Hunter was the first mortgagee of certain property, the equity of redemption being in one Brandling. Walters was Hunter's solicitor. Walters obtained from Hunter a deed which purported to be a conveyance to him of the property discharged from the mortgage and from the mortgage debt.

(1) 2 Rep. 9a. (2) L. R. 4 C. P. 713.
(3) L. R. 7 Ch. 75.

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The fact was that no money was paid by Walters to Hunter at all. The property was subsequently mortgaged by Walters by equitable deposit of the deeds. The contest was between Hunter, who had never received any money for the property, and the equitable mortgagee under Walters. Walters had misrepresented to Hunter the nature of the deed, and had led him to believe that after, as before, its execution he would still remain the first mortgagee of the property. It was held, nevertheless, that the deed was Hunter's deed, and that the equitable mortgagee had priority over Hunter. Lord Hatherley says this (1): "It is first said that we ought to regard the whole of these instruments as void, upon the principle of certain cases, such as *Kennedy* v. *Green* (2), where a representation has been made to a party to a deed that the instrument he is about to execute is an instrument of a totally different description from anything which it turns out to be. In such cases the person executing the instrument has not had his mind applied in any way to the words therein contained, but to a different state of things; for instance, when a person has signed a document, believing it to be a certificate, whilst it is, in fact, a bond. In the early books we find Lord Coke saying that if a man is blind or illiterate, and an instrument is read over to him falsely, then the instrument is void. (3) This is a proposition which one would not be inclined to dispute when broadly laid down; and I do not wish to go into the shades of difference between the cases cited before us, some of which might stand upon very different principles. There are two cases, I think, before Stuart V.-C. where mortgages were fraudulently obtained; and could, therefore, when transferred, not stand as a security for more than was due. But I think that all those cases are so entirely beside the present case, that I do not wish to make any further observations upon them." He held that the case before him did not come within that principle, and for the reason that there was no such misrepresentation as would have led the person signing to believe that the deed was of a totally different character from what it purported to be. Mellish L.J. put it even more clearly.

(1) L. R. 7 Ch. 81. (2) (1834) 3 My. & K. 699.
(3) 2 Rep. 2b, 9a.

He says (1): "Now, I am of opinion that there is evidence that both Hunter and Darnell were induced by the fraud of Walters to execute that deed; but the mere circumstance that they were induced to execute it by fraud does not make it a void deed in point of law. But it is said that there is something more than this, and that where a deed is procured by an actual false representation respecting the contents of the deed itself, or respecting the legal effect of the deed, there the deed is not only voidable, but is actually void at law, and, being void, the parties are in the same position as if it had never been executed at all. Thence, no doubt, it would follow, that Mr. Walters never got any estate in these premises at all, and therefore that an equitable mortgage by him would be altogether invalid. Now, in my opinion, it is still a doubtful question at law, on which I do not wish to give any decisive opinion, whether, if there be a false representation respecting the contents of a deed, a person who is an educated person, and who might, by very simple means, have satisfied himself as to what the contents of the deed really were, may not, by executing it negligently be estopped as between himself and a person who innocently acts upon the faith of the deed being valid, and who accepts an estate under it." And lower down he says: "Some of the judges expressed an opinion that in no case where a deed is void in that way could there be an estoppel; but no conclusive opinion was given on that point, and I do not think it necessary for me in this case to give any opinion upon it." Then he states the evidence, to which I need not refer, and continues: "When a man knows that he is conveying or doing something with his estate, but does not ask what is the precise effect of the deed, because he is told it is a mere form, and has such confidence in his solicitor as to execute the deed in ignorance, then, in my opinion, a deed so executed, although it may be voidable upon the ground of fraud, is not a void deed." That case is not a decision in favour of the defendant here; but it seems to me that these dicta contained in the judgments clearly point to this, that if a man knows that the deed is one purporting to deal with his property and he executes it, it will not be sufficient for him, in order to support a plea of

(1) L. R. 7 Ch. 86-8.

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non est factum, to shew that a misrepresentation was made to him as to the contents of the deed. The deed in the present case is not of a character so wholly different from that which it was represented to be as to come within the principle within which Lord Hatherley held that the case before him did not fall.

The only other case to which I propose to refer is *National Provincial Bank of England* v. *Jackson*. (1) It is really a case on the same point. There two sisters of one Jackson, who was a solicitor, executed two conveyances to him of property belonging to themselves in consideration—stating it shortly—of 700*l*. purporting to be paid to them by him. They were told by Jackson that they were executing two deeds respecting an existing mortgage for 700*l*. on the property, which he said it was necessary for them to sign in order to deal with that mortgage. Having full confidence in their brother, they signed the deeds relying on his explanation. They were defrauded. They were told that the deeds were of a nature which they were not, but they did understand that the deeds related to their property. It was held that the plea of non est factum could not succeed. Cotton L.J. says (2): "Now the rule of law is that if a person who seals and delivers a deed is misled by the misstatements or misrepresentations of the persons procuring the execution of the deeds, so that he does not know what is the instrument to which he puts his hand, the deed is not his deed at all, because he was neither minded nor intended to sign a document of that character or class, as, for instance, a release while intending to execute a lease. Such a deed is void. But I cannot come to that conclusion here. The defendants trusted Jackson both as their brother and solicitor, and cannot be said to have been guilty of negligence in so doing. On the evidence it is clear that nothing was said to mislead them as to the nature of the instrument they were executing. It is doubtful how far they understood the nature of the deeds, but it is in my opinion clear upon the evidence that they knew that the deeds dealt in some way with their houses." Lindley L.J. says (3): "It is impossible, consistently with legal principles, to hold the conveyances executed by the sisters

(1) 33 Ch. D. 1. (2) 33 Ch. D. 10.
(3) 33 Ch. D. 13.

absolutely void. They knew that they related to their houses although they did not understand their effect. They trusted their brother and were cheated by him." I do not think I need read the judgment of Lopes L.J. It seems to me that the Court of Appeal came to the conclusion that, although a man might be misled as to the nature of the deed, yet if he knew it related to his property he cannot succeed upon a plea of non est factum.

What does the evidence in the present case shew? I may go so far in the defendant's favour as to say that Webb, having regard to his knowledge of Hooper, when Hooper said that the deeds were "deeds for transferring the Edmonton property," was justified in believing that they were deeds such as a nominee could be called upon to execute either in favour of a new nominee or for the purpose of putting an end to his own position of nominee, and certainly not a deed creating a mortgage to another person. But in my opinion that is not enough. He was told that they were deeds relating to the property to which they did in fact relate. His mind was therefore applied to the question of dealing with that property. The deeds did deal with that property. The misrepresentation was as to the contents of the deed, and not as to the character and class of the deed. He knew he was dealing with the class of deed with which in fact he was dealing, but did not ascertain its contents. The deed contained a covenant to pay. Under those circumstances I cannot say that the deed is absolutely void. It purported to be a transfer of the property, and it was a transfer of the property. If the plea of non est factum is to succeed, the deed must be wholly, and not partly, void. If that plea is an answer in this case, I must hold it to be an answer in every case of misrepresentation. In my opinion the law does not go as far as that. The defence therefore fails. There must therefore be judgment for the plaintiff on the claim with costs. The counterclaim must be dismissed with costs as against the plaintiff and Whitaker, and there will be a declaration that the defendant is entitled to an indemnity against Hooper.

Solicitors: *Wordsworth, Blake & Co.; Bate & Co.; E. F. Champion, for Watson & Everitt, Lowestoft.*

W. I. C.

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THOMPSON *v.* HICKMAN.

[1906 T. 371.]

Vendor and Purchaser—Parcels—Minerals—Conveyance of Land with Minerals—Adjoining Railway the Boundary—Highway—Presumption as to Minerals underlying Railway—Written Option to Purchase—Subsequent Conveyance—Rectification of Conveyance and Option—Admissibility of Evidence—Possession of Minerals—Wrongful Working under Colour of Title—Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57), *s.* 1—*Purchase by Railway Company after Expiration of Special Act—General Statutory Powers—Ultra Vires—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 6, 16, 77—79.

The presumption that, where a highway is a boundary, the sub-soil of the highway ad medium filum viæ passes to the grantee of the land adjoining the highway, does not apply to a railway that is a boundary. Under a grant, therefore, of the land and minerals lying on each side of and adjoining a railway, the minerals underlying the railway, which have not been acquired by the railway company, will not pass to the grantee.

In 1875 A. by a written agreement gave B. a six months' option to purchase land and minerals on each side of and adjoining a railway. The option was duly exercised, and the land and minerals as described in the option agreement were conveyed to B. In 1884 B. had become the owner of collieries adjoining the land so acquired from A., and from that time worked parts of the minerals underlying the railway in the honest belief that he had a title thereto. In 1906 A. brought an action against B. claiming the minerals under the railway. B. counter-claimed for rectification of the conveyance and option agreement so as to include these minerals, alleging mutual mistake, and tendered evidence to shew that the parties at the date when the option was exercised intended to include these minerals in the purchase:—

Held, on the authority of *May* v. *Platt*, [1900] 1 Ch. 616, and *Davies* v. *Fitton*, (1842) 2 D. & War. 225, that the evidence was not admissible. *Quære* as to the principle of those decisions.

Held, also (following *Ashton* v. *Stock*, (1877) 6 Ch. D. 719), that B. had not by possession or otherwise acquired a title to the minerals underlying the railway, and that the Statute of Limitations afforded him no defence to the action.

A railway company at any time after the due completion of the railway authorized by their special Act can, under their general statutory powers, purchase any land within the limits of deviation of their deposited plans which are necessary for or incidental to the business they are carrying on, e.g., the maintenance of the line.

In 1863 a railway company under the powers of a special Act, which incorporated the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, acquired land, without the underlying minerals, and constructed their railway across it, within the four years for that purpose limited by the special Act. In 1904 the company, to prevent injury to the railway by subsidence, entered into an informal agreement to purchase the minerals from A., the owner, and subsequently by a contract under seal assigned the benefit of the agreement to B., who, claiming the minerals adversely to A., disputed its validity:—

Held, that the company, by assigning the agreement to B., had ratified it; and that it was not in other respects ultra vires the company, notwithstanding that their powers under their special Act had expired.

ACTION.

This was an action relating to the mines and minerals lying under the Arley tunnel and the railway line to the eastward thereof, belonging to the Midland Railway Company, under these circumstances.

In 1861 the railway company obtained a special Act authorizing them to construct certain new lines of railways: s. 2 incorporated with the Act the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845; s. 4 empowered the company, subject to the provisions of the Act and of the Acts incorporated therewith, from time to time to enter upon, take, and use all or any of the lands defined on the deposited plans; s. 5 empowered the company to make the railways authorized by the Act; s. 12 limited the company's powers of compulsory purchase to two years from the passing of the Act, the date of which was June 9, 1861; and s. 13 enacted that the railways should be completed within four years after the passing of the Act, "and on the expiration of that period the powers by this Act granted for making the same, or otherwise in relation thereto, shall cease except as to so much thereof respectively as shall then be completed."

In 1863 the company under the powers of this special Act purchased of one Andrew Thompson about sixteen acres of land in the parish of Nuneaton, in the county of Warwick, which were conveyed to them without the mines and minerals thereunder. Across this land the company constructed part of one of their new lines, including a tunnel called the Arley tunnel.

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In 1869 Andrew Thompson conveyed all his lands in the parishes of Ansley, Stockington, and Nuneaton, in the county of Warwick, together with all mines and minerals, to trustees upon certain trusts. This conveyance included the lands and minerals lying on each side of and adjoining the tunnel and the railway to the eastward thereof, and also the mines and minerals lying under the tunnel and railway. These mines and minerals formed part of the Warwickshire coalfields, and comprised at least five seams of coal, two of which were known as the two-yard seam and the nine-foot seam.

By an agreement dated May 5, 1875, the Thompson trustees, in consideration of 1000*l.* then paid to them, gave David Barr the option of purchasing the property described in the schedule thereto, and delineated in the plan thereto annexed, at the price of 31,000*l.*, such option to be exercised in writing before November 15, 1875. The schedule described the property as the Ansley estate, and the parcels included the lands on each side of and adjoining the tunnel and railway, and the plan shewed the railway as the boundary between these lands. The option was duly exercised, and by deed dated March 25, 1876, the property comprised in the option agreement was conveyed by the same descriptions and a similar plan, together with all mines and minerals, to David Barr in fee simple; by deed dated March 27, 1876, David Barr conveyed the same property by the same descriptions and plan at an increased price to Sir Alfred Hickman in fee simple.

In 1899 Sir Alfred Hickman gave the railway company notice under s. 78 of the Railways Clauses Act, 1845, of his intention to work the mines and minerals under the tunnel and the railway to the eastward thereof, and the company, to protect their tunnel and railway from injury by subsidence, entered into negotiations with him, and by an agreement dated July 10, 1903, they agreed to purchase from him the mines and minerals under the tunnel and the railway to the eastward thereof upon certain terms. On investigating his title the objection was taken that these mines and minerals belonged to the Thompson trustees, and thereupon negotiations ensued between the company and James Girdwood, the then surviving trustee of the settlement, and by an agreement dated March 30, 1904, and made between James

Girdwood, as vendor, of the one part, and the company of the other part, the vendor agreed to sell to the company for 4500*l.*, first, all mines and minerals under the lands delineated on the plan attached thereto and coloured red and blue, as to the mines and minerals under the land coloured red for an estate in fee simple, and as to the mines and minerals under the land coloured blue for such estate and interest therein as the vendor had; and, secondly, all such right (if any) as the vendor might have to recover mesne profits from Sir Alfred Hickman for having unlawfully encroached upon and worked any of the said mines and minerals. By clause 4 of this agreement the purchase was to be completed on and not before the final decision referred to in clause 7 should have been obtained. Clause 6 provided that the company should pay the vendor's surveyor's fees and law costs, which were agreed at 200 guineas. Clause 7 provided that the sale (except as to the provision for payment of costs in clause 6, which was to have effect in any event) was conditional on a final judicial decision being obtained by the company without expense to the vendor binding on Sir Alfred Hickman and adverse to his claim to the same mines and minerals, and that the company should use their best endeavours to obtain such decision forthwith. This agreement (called the Girdwood agreement) was not executed by the company, but was signed by Messrs. Beale & Co. as the solicitors and agents of the company, and the land coloured blue on the plan thereto was the site of the tunnel and the land coloured red was the site of the railway to the eastward of the tunnel.

In pursuance of this agreement the company commenced an action in the Chancery Division against Sir A. Hickman to obtain a declaration that he was not entitled to the mines and minerals in question, but subsequently, by an agreement under seal, they compromised this action and assigned to him the full benefit of the Girdwood agreement, with liberty either to enforce or dispute the same as he might think fit.

James Girdwood died in April, 1904, and the plaintiffs, as the present trustees of the Thompson settlement, brought this action against Sir A. Hickman, David Barr, and the Midland Railway Company, claiming, as against the defendants Hickman and

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Barr, a declaration that as such trustees they were entitled to the mines and minerals under the tunnel and the railway to the eastward thereof; and, as against the company, specific performance of the Girdwood agreement. The defendants traversed the allegations of the plaintiffs, and alleged that the mines and minerals in question (called the disputed minerals) passed by the deed of March 25, 1876, and that Beale & Co. had no authority to enter into the Girdwood agreement on behalf of the company, and that the same was not binding on the company. The defendants Hickman and Barr further alleged that the parties to the option agreement and deed of March 25, 1876, intended to include the disputed minerals in those documents; that the defendant Hickman had been in possession of the same minerals since 1876, and had acquired a title thereto by virtue of the Statute of Limitations; and they counter-claimed (1.) for a declaration that the disputed minerals passed by the deed of March 25, 1876, and (2.) alternatively for rectification of that deed and (if necessary) of the option agreement so as to include those minerals.

It appeared from the evidence that in 1879 Sir Alfred Hickman, acting in good faith, had granted to one Nowell a lease of certain seams of coal, including a small portion of the disputed minerals, with power to work the same; that in 1881 he had accepted a surrender of this lease, and had soon afterwards purchased the Haunchwood collieries, which adjoined the lands he had acquired under the deed of March 27, 1876; and that since 1884 he had been working the seams of coal in these collieries and under these lands in due course of management, and in such workings had approached the railway, and had for twelve years and upwards worked portions of the disputed minerals in the honest belief that he was the owner thereof.

Micklem, K.C., and *T. B. Napier*, for the plaintiffs. The whole case really depends on whether the disputed minerals passed to Barr under the conveyance of March 25, 1876. On the construction of that deed it is perfectly clear that they did not pass. There is no ambiguity in the parcels, and parol

evidence is not admissible to shew that the conveyance was intended to include these minerals. The written contract before the deed shews the intention of the parties.

Warmington, K.C., Jenkins, K.C., and *A. à B. Terrell*, for all the defendants. The minerals were intended to pass, and did pass, by the conveyance to Barr. All the Ansley estate is conveyed, and evidence is admissible to shew what that estate included: *Lord Waterpark* v. *Fennell* (1); *Lyle* v. *Richards* (2); *Van Diemen's Land Co.* v. *Table Cape Marine Board.* (3) But apart from this, it is clear from the whole conveyance that the trustees intended to convey to Barr all the estate left in them. If they had intended to except the minerals, they would have done so expressly. Further, the land on both sides of the tunnel or railway was conveyed to Barr, and a railway is a highway: *Rex* v. *Severn and Wye Ry. Co.* (4); and, where a highway, or a public or private road, or a creek, forms a boundary, the presumption is that the sub-soil ad medium filum viæ passes to the grantee of the adjoining land: *Berridge* v. *Ward* (5); *Holmes* v. *Bellingham* (6); *Lord* v. *Commissioners for the City of Sydney* (7); *Micklethwait* v. *Newlay Bridge Co.* (8); *In re White's Charities.* (9) The same presumption, it is submitted, applies where a railway is the boundary. If so, the minerals underlying the tunnel and railway passed to Barr under his conveyance as the grantee of the lands on each side of the railway.

NEVILLE J. The conclusion I have come to upon the first point is that, upon the true construction of the deed of March 25, 1876, the minerals under the tunnel did pass by that conveyance, but that the minerals under the railway line to the east of the tunnel did not pass. The grant of the Ansley estate is governed by the description of the particular items that constitute the estate given in the schedule, and I do not think that evidence is admissible under these circumstances to shew what the Ansley estate was. The parties have themselves

(1) (1859) 7 H. L. C. 650.
(2) (1866) L. R. 1 H. L. 222.
(3) [1906] A. C. 92, 98.
(4) (1819) 2 B. & Al. 646.
(5) (1861) 10 C. B. (N.S.) 400.
(6) (1859) 7 C. B. (N.S.) 329.
(7) (1859) 12 Moo. P. C. 473.
(8) (1886) 33 Ch. D. 133.
(9) [1898] 1 Ch. 659.

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particularized the estate in the schedule, and consequently there is no ambiguity in the deed as to what is the meaning of the conveyance. I am, however, asked to hold that, where land on either side of a railway line is granted, the minerals underlying the railway line pass unless they have been previously vested in the railway company, and I am asked so to hold on the analogy of the presumption which obtains in the case of land bounded by highways. I cannot come to the conclusion that I should be right in acting upon any such presumption, which, so far as I know, is wholly unknown to the law at the present time. I think the very different circumstances under which railways came into existence and those in which watercourses and highways came into existence are sufficient to shew that the presumption does not apply to the case of a railway. It seems to me, therefore, that, upon the construction of the deed, the minerals underlying the railway did not pass to the grantee, the defendant Barr.

Micklem, K.C. The next point is as to the validity of the Girdwood agreement. It is submitted that the railway company, by assigning that agreement to the defendant Hickman, adopted and ratified it and cannot now repudiate it.

Warmington, K.C. We contend that it is not a valid contract for three reasons: First, it was not executed pursuant to the provisions of the company's special Act of 1844, which is the Act that governs such transactions; secondly, if Beale & Co. had authority to make the contract, it was never duly ratified by the company, because ratification is a question of intention, and it was assigned by the company, not for the purpose of carrying into effect, but with the object of litigating it; thirdly, if it was ratified, it was nevertheless ultra vires the company, because their statutory powers of acquiring land under the special Act of 1861 expired in 1865. It is not a contract under ss. 77—79 of the Railways Clauses Consolidation Act, 1845. Hickman gave notice under s. 78 to work the minerals, but he had no title. The Thompson trustees cannot give the notice, because they cannot get at the minerals to work them. This is not a case like *Errington* v. *Metropolitan District Ry. Co.* (1),

(1) (1882) 19 Ch. D. 559.

where the company gave notice to purchase the minerals separately within the time limited by their special Act.

Micklem, K.C., in reply.

[NEVILLE J. I only want to hear you on the question of ultra vires.]

A railway company has power at all times and from time to time to acquire minerals under their railway, so long as it is not in contravention of their statutory powers, and so long as it is reasonably necessary for and incidental to the purposes of their undertaking. Here s. 13 of the special Act of 1861 expressly excepts from the time limit so much of the railways as should then be completed; that leaves them all their powers in respect of their completed line, including the power from time to time to purchase any minerals or land, within the limits of deviation shewn on their plans, required for the maintenance of their railway. This line was completed within the time limit, and therefore, under s. 16 of the Railways Clauses Consolidation Act, the company now have power to purchase these minerals for the maintenance of their line. Sects. 6 and 77—79 of that Act must be read together, and are not intended to limit the powers of the company, but to protect the mineowners: *Smith* v. *Great Western Ry. Co.*(1); and it is not ultra vires to acquire the minerals before notice to work has been given under s. 78 by the owner.

NEVILLE J. I will hear the rest of the case before giving judgment on these points.

Warmington, K.C. The next point is the rectification of the option agreement and of the conveyance to Barr. It is submitted that under the circumstances parol evidence is admissible to shew that the parties intended the sale to include these minerals.

Micklem, K.C., objected that the evidence was not admissible. The point was covered by *May* v. *Platt*(2) and *Davies* v. *Fitton*.(3)

Warmington, K.C. Those cases are distinguishable. This

(1) (1877) 3 App. Cas. 165. (2) [1900] 1 Ch. 616.
(3) 2 D. & War. 225.

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agreement was not an ordinary agreement for sale, but the giving of an option for value, and there was no agreement by Barr to purchase unless and until he exercised the option. Our case is that in the meantime he was supplied with valuations and reports which included these minerals, and the question is, What was the true construction of the agreement when the option was exercised? That is the date, we submit, when the agreement became an agreement for purchase. We tender evidence to shew that at that date the parties intended these minerals to be included in the purchase: Dart's Vendors and Purchasers, 7th ed. p. 669; *Tyler* v. *Beversham* (1); *Wright* v. *Goff* (2); *Mortimer* v. *Shortall.* (3)

NEVILLE J. I think the evidence is not admissible.

Warmington, K.C. The next point is the Statute of Limitations. How far the working of minerals amounts to possession by the person working them is a question of fact in each case.

[*Micklem, K.C.* We admit that Hickman worked these minerals in the honest belief that he was the owner, but we did not know that he was working them or that our title was questioned until 1903.]

We cannot prove an actual working by Hickman of the two-yard seam prior to twelve years before the action, but we do shew an actual working by him of the nine-foot seam continuously from 1884 in the bona fide belief that he had a good title to it; and when a party really begins to work a seam, and shews by his working plans that he intends to work the whole seam, that is a taking possession of that seam and of all the other seams, and the owner of a mine is the owner of all the spaces and cavities in the mine where the coal has been worked out: *Batten Pooll* v. *Kennedy.* (4) The nearest case to the present is *Low Moor Co.* v. *Stanley Coal Co.* (5) The plaintiffs may rely on *Earl of Dartmouth* v. *Spittle* (6) and *Ashton* v. *Stock* (7), but they are

(1) (1673) Finch, 80.
(2) (1856) 22 Beav. 207.
(3) (1842) 2 D. & War. 363.
(4) Ante, pp. 256, 267.
(5) (1875) 33 L. T. 436; on appeal (1876) 34 L. T. 186, 189.
(6) (1871) 24 L. T. 67.
(7) 6 Ch. D. 719.

cited in the *Low Moor Case* (1), and Lord Cairns seems rather to differ from them. If we are right on the Statute of Limitations, the plaintiffs are not entitled to specific performance of the Girdwood agreement. But if we are wrong, the company cannot now fulfil the agreement, and the plaintiffs are only entitled to damages for the breach of clause 7 of the agreement.

Micklem, K.C., in reply. As to the Statute of Limitations, the defendant Hickman is put out of Court by his own evidence. He has been working his own mines since 1884, and in course of working them he has exceeded his boundaries and trespassed into our seams in the belief that they were his. That does not give him under the statute the right to possession of our seams. *Ashton* v. *Stock* (2) is directly in point. As to the Girdwood agreement, we are entitled to specific performance against the company, and to payment of the 4500*l.* for our coal. The company committed a breach of clause 7 in compromising with Hickman, and cannot set up their default as an answer to our claim for specific performance.

Cur. adv. vult.

Feb. 11. NEVILLE J. In the year 1863 the Midland Railway Company acquired a part of the site of one of their lines between Birmingham and Leicester from Mr. Thompson. The conveyance to them did not include the minerals. In 1869 Thompson executed a settlement of the lands in Ansley, Stockington, and Nuneaton, which lay on either side of the lands conveyed by him to the railway company. This settlement included the minerals under the railway. Small parts of the settled property were from time to time sold by the trustees, and on May 5, 1875, they entered into an agreement with the defendant Barr under which, in consideration of 1000*l.*, they gave him an option to purchase the estate for 31,000*l.* The property to be sold was particularly described in this agreement. The option was subsequently exercised by Barr, and by an indenture dated March 25, 1876, the property was conveyed to him by a description not substantially differing from that contained in the agreement. In

(1) 33 L. T. 436; on appeal, 34 L. T. 186, 189.
(2) 6 Ch. D. 719, 726.

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the same year Barr conveyed to the defendant Hickman. There are seams of coal underlying the property. The defendant Hickman having given notice in 1899 under s. 78 of the Railways Clauses Act, 1845, to the railway company of his intention to work some of the mines under the railway, the railway company upon investigation of his title were advised that part at all events of the minerals claimed by him was vested in Mr. Thompson or his representatives. The railway company thereupon entered into negotiations with the surviving trustee of the settlement, and ultimately entered into an agreement with him dated March 30, 1904, referred to as the Girdwood agreement. By this agreement they agreed to purchase the mines in certain contingencies for 4500*l.*, and undertook to use their best endeavours to obtain a decision of the Courts adverse to the defendant Hickman's claims. In pursuance of this agreement the company commenced proceedings against Hickman, but these proceedings were compromised upon terms contained in an agreement dated July 30, 1904, which involved a breach of the Girdwood agreement, and the railway company thereby, amongst other things, assigned the benefit of the latter agreement to Hickman, with liberty to enforce or dispute it as seemed to him best. I have already decided that by the grant of March 25, 1876, the minerals under the Arley tunnel passed to Barr, but those under the railway to the east of the tunnel did not pass; that the conveyance was without ambiguity; and that evidence other than that of surrounding circumstances was inadmissible to explain the deed. The points remaining to be disposed of are, first, that Messrs. Beale & Co., the company's solicitors, who signed the agreement of March 30, 1904, as agents for the company, acted without authority, that the agreement was insufficiently executed, and that it was ultra vires. These contentions are founded upon the provisions of the Midland Railway Acts, 1844 and 1861, but are in my opinion groundless. I do not think that in dealing with third persons the directors, if they are acting in a matter within their powers, are protected by their own failure to conduct their business in accordance with the formalities directed by their Act. The benefit of the Girdwood agreement has been assigned under the company's seal to Hickman, and in my opinion the

company, having so dealt with the agreement, have confirmed the authority of Beale & Co. to enter into it on their behalf. Moreover, it appears from the company's answer to interrogatories that the chairman of the company had expressly given authority to the solicitors, and that the matter had more than once afterwards been brought before the board and assented to, although no minute of a resolution affirming the action of the solicitors is forthcoming. Turning to the question of ultra vires, I think that the company had at any time after the completion of the railway sanctioned by the Act of 1861 power to purchase the minerals beneath their line, if they thought it advisable in the interests of the business. Such a purchase appears to me reasonably incident to the business they are carrying on under the general parliamentary powers vested in them, and I find nothing in the Act of 1861 which prohibits it. Secondly, rectification is asked of the conveyance of March 25, 1876 (and, if necessary, of the antecedent agreement), in order to extend the conveyance to the minerals underlying the railway in conformity with what is alleged to have been the intention of the parties. I have rejected evidence upon this point. *Davies* v. *Fitton* (1) and *May* v. *Platt* (2) appear to me to be decisions to the effect that the Court will not upon the ground of mutual mistake rectify a conveyance which has been executed in conformity with a previous agreement in writing come to between the parties. The ground of these decisions appears to be that evidence of the intentions of the parties dehors the written agreement cannot be received without infringing a well-known rule of law, and that to grant relief in such a case would be equivalent to the grant of specific performance of a written contract with a parol variation. I think no sound distinction can be drawn between the agreement of May 5, 1875, after exercise of the option and an agreement binding on both parties ab initio, and that I am bound by these decisions. I feel considerable difficulty, however, in following the reasoning upon which they appear to be based. The doctrine of *Woollam* v. *Hearn* (3) appears to me to have no bearing upon a case of rectification. Specific performance comes under a head

(1) 2 D. & War. 225. (2) [1900] 1 Ch. 616.
(3) (1802) 7 Ves. 211.

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of equitable jurisdiction quite distinct from rectification. The former is based upon the inadequacy of the remedy appointed in certain cases by the common law; the latter gives relief from the inflexibility of the common law, and from the nature of the case involves a contravention of its rules. To refuse rectification, therefore, on the ground that to grant it would offend against a rule of law appears to me to strike at the root of equitable jurisdiction in the matter, while to grant relief where the error has crept into one document and refuse it where it is embodied in two is inconsistent with equitable principle, for equity regards the substance rather than the form of a transaction. It is to be observed that the rule in question, which excludes parol evidence to contradict a written agreement, applies with even greater force to a deed. The next point raised was whether the Statute of Limitations formed an answer to the plaintiffs' claim in whole or in part. The working plans of the Haunchwood Colliery were produced, and it appeared that the defendant Hickman had in 1879 leased certain minerals to the then proprietor of the colliery, which included a small corner of the disputed minerals. There is no evidence that any part of these minerals had been worked under this lease. At a later date Hickman acquired first the lease and then the freehold of the Haunchwood Colliery and proceeded to work them himself. In the course of such working some part of the nine-foot seam underlying the Midland Railway to the east of the tunnel had been worked more than twelve years before the commencement of the present action by Hickman in the bona fide belief that he had title, and it was argued that he had acquired a statutory title thereby. I think this point is decided by the case of *Ashton* v. *Stock* (1), and I entirely agree with the decision that the mere wrongful getting of neighbouring coal by a mineowner twelve years before action confers no title under the statute. The plaintiffs, therefore, are entitled to a declaration of their title to the mines underlying the railway to the eastward of the tunnel, and the question arises as to the relief to which they are entitled under the agreement of March 30, 1904. In the first place, they are entitled to the payment of 200 guineas under clause 6. I do not think, however, they are entitled to

(1) 6 Ch. D. 719, 726.

specific performance, inasmuch as the purchase of the minerals was made conditional upon a decision adverse to the defendant Hickman being obtained by the company from the highest Court of Appeal. It is true that this condition has been rendered impossible of fulfilment by the action of the railway company themselves in compromising their action against Hickman by the agreement of July 30, 1904. It is contended that thereby the condition was waived or the benefit forfeited, and that the company became bound to complete the purchase subject only to proof of title to the minerals under the railway to the eastward of the tunnel. In my opinion this is not so. The company expressly agreed to use their best endeavours to obtain such a decision, and of this agreement they have committed a breach, and I think the true remedy of the plaintiffs is by way of damages for such breach. There must therefore be an inquiry as to the damages sustained by the plaintiffs by reason of this breach, and I think that, the plaintiffs having shewn title, the measure will be the difference between the price of 4500*l.* agreed to be paid by the company on the one hand and the selling value of the mines and the value of the rights against Hickman in respect of coal wrongfully worked on the other hand. I do not think the costs of the action have been sensibly increased by the claim to the minerals under the tunnel. I think, therefore, the defendants must pay the plaintiffs' cost of the action, and the counter-claim must be dismissed with costs, and the company must pay the difference between party and party costs and solicitor and client costs in accordance with the agreement.

Solicitors: *Sheard & Breach; J. O. Hickman.*

H. L. F.

NEVILLE J.

1907

Feb. 19, 20, 21.

BEALE *v.* KYTE.

[1906 B. 2395.]

Vendor and Purchaser—Written Contract—Conveyance—Error in Parcels—Common Mistake—Rectification of Conveyance—Laches.

In 1900 A. sold and conveyed land to B. In 1906 A. brought an action against B. for rectification of the conveyance, alleging that by common mistake the parcels in the conveyance included more land than was comprised in the written contract in pursuance of which the conveyance was executed. A. commenced the action as soon as he became aware of the error. B. denied any mistake, and further contended that A. came too late for rectification:—

Held, on the evidence, that there had been a common mistake, and that A. was entitled to rectification, for that he had not been guilty of any laches.

Bloomer v. *Spittle*, (1872) L. R. 13 Eq. 427, questioned.

ACTION.

In October, 1900, the plaintiffs Beale and Vickars entered into a written contract with the defendant to sell to him "three plots of freehold building land numbered 101, 102, and 103 on the plan annexed" to the contract, and the purchase was completed on November 16, 1900, by a conveyance with a plan thereon. In March, 1905, the plaintiffs sold and conveyed the adjoining plot 104 to one Salvage, who commenced to build on it, and in March, 1906, when the buildings were nearly completed, the defendant complained that Salvage was encroaching on his plot 103, and commenced an action of ejectment against him, and the plaintiffs then for the first time became aware that, through an error on the part of a clerk in the office of their solicitor, the measurements on the plan on the conveyance of November 16, 1900, did not agree with the measurements on the plan on the contract of October, 1900, and gave the defendant part of plot 104, to which he was not entitled under that contract. Thereupon in June, 1906, the plaintiffs brought this action, alleging a common mistake, and claiming rectification of the conveyance of November 16, 1900, by altering the plan thereon so as to accord with the measurements on the plan annexed to the contract. The

defendant denied any mistake, and alleged that the conveyance correctly carried out a parol agreement made with him by the plaintiffs prior to the written contract, and that the parol agreement was incorrectly reduced into writing by that contract.

Having regard to the view the Court took of the evidence the case does not call for a report, except for the observations on the case of *Bloomer* v. *Spittle*. (1)

Jenkins, K.C., and *A. L. Morris*, for the plaintiffs.

Butcher, K.C., and *F. E. Farrer*, for the defendant. There was no mistake, but if there was the plaintiffs come too late for rectification: *Bloomer* v. *Spittle*. (1)

Jenkins, K.C., in reply. *Bloomer* v. *Spittle* (1) is adversely commented on in Williams' Vendor and Purchaser, p. 717.

NEVILLE J. said that he could not accept the defendant's evidence, and came to the conclusion that the error in the plan on the conveyance was the result of a mistake common to both parties, and that the plaintiffs were entitled to rectification, and continued:—But I was referred to the case of *Bloomer* v. *Spittle* (1), and it was argued upon the authority of that case that the plaintiffs were too late in coming to the Court for rectification, inasmuch as a longer time had elapsed in the present case between the execution of the conveyance and the bringing of the action than elapsed in that case, where apparently it was held that the lapse of time was fatal to the claim for rectification. *Bloomer* v. *Spittle* (1), as reported, is to my mind wholly unintelligible, and I think there must be some mistake in the report. From the case as reported it appears that the learned judge came to the conclusion upon the evidence that a conveyance containing a very serious and important error had been executed by mutual mistake of the parties, and further that the defendant in the action was improperly seeking to take advantage of that mistake. Having come to that conclusion, he refused relief on the ground, apparently, that four years had elapsed between the date of the execution

(1) L. R. 13 Eq. 427, 430.

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of the conveyance and the bringing of the action. At the same time the learned judge offered relief by rescission to the plaintiff, giving the defendant the alternative of accepting rectification of the deed or accepting rescission. In the first place, it seems to me that the offer was inconsistent with the view that the plaintiff had been guilty of laches, because, if laches was a sufficient answer to the claim for rectification, it was also a sufficient answer to any claim for rescission. Consequently, to my mind the case is unintelligible on that point. But, further than that, in all cases of mistake in order that laches or acquiescence may be a defence there must be notice of the error, and time runs from the date of the notice and not from the time when the error is committed; and it is inconceivable to my mind that on a question of laches time can run from the time the mistake was committed. It seems to me it must run from the time when the plaintiff's attention is first called to the error. In the present case there has been no laches, because the plaintiffs' attention was not called to the error until shortly before the action was commenced. The principal reason why their attention was not called to it was because the defendant failed to carry out his covenant in his conveyance to build three houses upon the land. Had he taken possession of the land in a practical sense—that is, had the land been measured or fenced, which would have been necessary if buildings had been put up—he could not have failed to ascertain the difference between himself and his vendors at once. But he did nothing, the land lay open, and it was not until the purchaser of plot 104 had erected or nearly finished the erection of a house on his plot that the defendant took any steps to ascertain what he supposed to be his rights under his conveyance. Laches is not pleaded in the present case, but, if it were, it seems to me the time to be considered is not the date of the execution of the conveyance, but the time when the attention of the plaintiffs was called to the fact that the conveyance contained a mistake in the measurement of the parcels. I think, therefore, that the conveyance ought to be rectified, and the only rectification necessary is the rectification of the plan on it so as to shew that the measurement referred to in the body of

the deed is a measurement from a particular point as indicated in the plan annexed to the written contract.

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Solicitors: *Burton, Yeates & Hart, for G. A. Flowers, Steyning; Radford & Frankland, for Holmes & Johnson, Brighton.*

H. L. F.

In re CATTELL.

CATTELL *v.* CATTELL.

[1906 C. 1963.]

NEVILLE J.
1907
Feb. 18, 22.

Will—Accumulation—Accumulations Act, 1800 (*Thellusson Act*) (39 & 40 *Geo.* 3, *c.* 98), *s.* 1—"*Minority of person who if of full age would be entitled to the rents and profits*"—*Person born after the Testator's Death.*

The fourth of the periods mentioned in the Thellusson Act during which accumulation is allowed, viz., "The minority or respective minorities only of any person or persons who, under the . . . . trusts of the . . . . will . . . . directing such accumulations, would, for the time being, if of full age, be entitled unto the rents . . . . so directed to be accumulated," is not confined to the minority of persons born in the testator's lifetime.

The dicta in *Haley* v. *Bannister*, (1819) 4 Madd. 275, and *Jagger* v. *Jagger*, (1883) 25 Ch. D. 729, discussed and not followed.

THOMAS CATTELL, who died in 1880, by his will dated May 14, 1868, after certain specific devises, devised all other his freehold and copyhold hereditaments to the use of three trustees, their executors, administrators and assigns, for the term of 1000 years upon the trusts thereinafter mentioned, and subject thereto to the use of all the children of any of his sons living at his death or born afterwards, who being sons should attain twenty-one, or being daughters should attain that age or marry, as tenants in common in equal shares per stirpes; and he declared the trusts of the term of 1000 years to be to permit his wife to reside in the mansion-house and to pay her an annuity of 800*l.* a year during widowhood, and to pay annuities of 100*l.* to each of his sons until twenty-five and daughters until twenty-five or marriage, and annuities of 200*l.* to each daughter who should attain twenty-five or marry for the rest of her life, and to raise and pay 2000*l.* to each son at twenty-five; and subject to certain powers of

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maintenance and education of children of daughters and sons, he directed his trustees to apply the rents and profits, during suspense of the indefeasible vesting of the said hereditaments and premises under the ultimate limitations thereof thereinbefore contained, in payment of the principal sums directed to be raised and paid, and any mortgages and charges which might be subsisting, and to accumulate the surplus income by investment as therein mentioned to form a fund by anticipation for the purpose of such payment; and he directed that the surplus of accumulations not so applied should fall into the residue of his personal estate; and he directed that the ultimate surplus of the rents and profits during the suspense of such indefeasible vesting of the said hereditaments or any part thereof as aforesaid should be applicable as follows:—

"Whenever there shall be living any child or children of any son or deceased son of mine or there shall have been any such child or children who being living at my death or born afterwards shall have died as to a son after attaining that age and as to a daughter after attaining that age or marrying then such ultimate surplus of the said rents and profits shall from time to time be paid or appropriated to and divided between all the children who shall for the time being be living of any son or deceased son of mine and the executors and administrators of every or any deceased child of any son or deceased son of mine which child shall have been living at my death or born afterwards and being a son shall have attained the age of twenty-one years or being a daughter shall have attained that age or married under that age as personal estate of such deceased child in equal shares per stirpes. But so nevertheless that as to the share of any minor child of a deceased son of mine any payments during the current year for or towards the maintenance of such child under the power hereinbefore contained shall be taken into account as part of the share of such child under the trust lastly hereinbefore declared and that with regard both to the residue of the share appropriated to any minor child of a deceased son of mine and to the share appropriated to any minor child of a son of mine then living the same shall during such minority be accumulated by investment thereof and of the

resulting income in any such mode as aforesaid with power to vary the investment thereof and every such accumulated fund may be applied during or after the period of accumulation thereof hereinbefore mentioned for or towards the satisfaction and discharge of any of the principal sums hereinbefore directed to be raised out of the said premises comprised in the said term of 1000 years or of any mortgages or charges effected for raising such principal sums or any of them and if and so far as not so applied shall at the expiration of the period of accumulation thereof sink into my residuary personal estate."

If and whenever there should be no person who could take the ultimate surplus of the income under the trusts aforesaid, the testator directed his trustees to divide such income amongst such of his sons as should be living for the time being in equal shares, with a trust for accumulation during minority.

The testator gave his residuary personal estate to the same trustees upon such trusts as should most nearly correspond with the uses and trusts thereby declared concerning the freehold hereditaments contained in the said term of 1000 years.

The will also contained a power for the trustees at their absolute discretion, during such suspense of absolute vesting as aforesaid, either to distribute the surplus income pursuant to the trusts aforesaid or apply the same in discharge of the said capital sums therein mentioned.

The testator died on October 1, 1880, leaving his wife, five sons, and three daughters surviving. The widow died in 1893. Three of the sons died without having married before the date of this summons. The eldest son had married and had two daughters—Gladys, who was living and was born on April 27, 1885, and attained twenty-one on April 27, 1906, and one who died in infancy. The fifth son was alive, but a bachelor. The daughters were all living; one of them had four children living, the others had no children. The sons had all attained twenty-five, and the sums of 2000*l.* had been raised and paid. The trustees had divided the income of the testator's real and personal estate among his sons until the birth of Gladys, and had then accumulated the income until she attained twenty-one.

After that event the trustees took out this summons for the

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determination of the question, among others, whether the trust for accumulation during the minority of Gladys was void under the Thellusson Act during the period from October 1, 1901, the expiration of twenty-one years from the testator's death, and April 27, 1906, when she attained twenty-one.

The defendants were Gladys Cattell, her father, the testator's heir-at-law, and the testator's married daughter.

The testator's real estate produced an income of about 3000*l.* a year, and the personal estate and accumulations of income in the trustees' hands amounted to 96,000*l.*

Bramwell Davis, K.C., and *G. F. Hart*, for the trustees.

Jenkins, K.C., and *Clauson*, for Gladys Cattell. The question is whether the accumulations between 1901 and 1906 are undisposed of and go to the heir-at-law or whether Gladys is entitled to them—in other words, whether the twenty-one years, allowed by the Thellusson Act ran from the death of the testator or from the birth of Gladys. It is submitted that the will does not offend against the Act, because there is no direction to accumulate between the death of the testator and the birth of a child. The only direction to accumulate is during the infancy of a person who if of full age would be entitled to the property; that is within the fourth rule in the Act, and Gladys takes the whole income unless and until another child comes into existence. There are, however, dicta to the contrary. In *Haley* v. *Bannister* (1) Sir J. Leach V.-C. said: "The statute prevents an accumulation of interest during the minority of an unborn child"; and that dictum is adopted by Lord Langdale M.R. in *Ellis* v. *Maxwell*. (2) The case of *Bryan* v. *Collins* (3) may also be cited against us, but the observations of the Master of the Rolls are based upon a misconception of *Haley* v. *Bannister* (1) and *Ellis* v. *Maxwell*. (2) In both of those cases the dicta in question were not necessary for the decision of the point then before the Court, and are, it is submitted, against the plain words of the Act and erroneous. The question is discussed in Jarman on Wills, 5th ed. vol. i. pp. 273—274, and Theobald on Wills, 6th ed. p. 591.

(1) 4 Madd. 275, 277. (2) (1841) 3 Beav. 587, 597.
(3) (1852) 16 Beav. 14, 16.

Butcher, K.C., and *Northcote*, for the heir-at-law. On the construction of the will Gladys is not a person who is absolutely or indefeasibly entitled to these rents and profits, because the trustees have power to divest and apply the accumulations to raise and pay thereout the capital charges mentioned in the will. Therefore the case falls within the principle of *Jagger* v. *Jagger*. (1) Secondly, the word "only" in the fourth rule of the Act shews that power to accumulate is given for a particular minority only, and not for successive periods of minority. Here, if Gladys had died at twenty and another child had been born, the accumulations would go on for another twenty-one years. That would be tying up the income for some forty years, which would be in contravention of the spirit of the Act and bad, because the Act only permits accumulation for twenty-one years and no more: *Longdon* v. *Simson*. (2) The words "respective minorities" in the fourth period referred to by the Act must not be read "successive minorities"; they must refer to minorities of different persons entitled to different funds. It was held by Sir John Leach V.-C. in *Haley* v. *Bannister* (3) that "the statute prevents an accumulation of interest during the minority of an unborn child"; and that view has been followed by Lord Langdale in *Ellis* v. *Maxwell* (4), Sir J. Romilly in *Bryan* v. *Collins* (5), and Kay J. in *Jagger* v. *Jagger*. (1) The Act intended that all four periods should commence at the death of the testator or the commencement of the settlement.

Tanner, for the testator's daughters. My clients take an interest in the accumulations of income from personalty if the accumulation was invalid. *Webb* v. *Webb* (6) and *Attorney-General* v. *Poulden* (7) are authorities that where a will directs accumulations to begin at a date subsequent to the testator's death they can only be continued to the end of twenty-one years from the death.

[NEVILLE J. There were no minorities in those cases.]

Jenkins, K.C., in reply.

Cur. adv. vult.

(1) 25 Ch. D. 729.
(2) (1806) 12 Ves. 295.
(3) 4 Madd. 275, 277.
(4) 3 Beav. 587.
(5) 16 Beav. 14.
(6) (1840) 2 Beav. 493.
(7) (1844) 3 Hare, 555.

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Feb. 22. NEVILLE J. The testator devised his real estate to the use of his trustees for the term of 1000 years, and subject thereto to the use of the children of his sons attaining twenty-one, or in the case of daughters marrying. The term was limited upon certain trusts for his widow durante viduitate, and for the raising of certain annual sums for his sons and daughters and of capital sums of 2000*l.* for his sons at twenty-five and of 5000*l.* for the children of his daughters. The testator empowered his trustees during the suspense of indefeasible vesting to accumulate for the satisfaction of the principal sums before mentioned. It was not contended that the Thellusson Act was applicable to this power of accumulation. The testator then gave the ultimate surplus of the rents and profits amongst the living children of his sons and the executors of any deceased child who should have attained twenty-one, or in the case of daughters married in equal shares per stirpes. Then follows a power of accumulation during the minority of any child of the sons. Upon this clause the question argued before me turns. The trusts of the leasehold and personal estates are referential, and, though later clauses in the will were referred to in the argument, I do not think they really affect the interest taken under the will by the children of the testator's sons. The testator left five sons and three daughters. Three of the sons are dead without issue; one son is living, having one child, the defendant Gladys Cattell, who attained twenty-one on April 27, 1906, and the remaining son is a bachelor. Upon attaining twenty-one, therefore, the defendant Gladys Cattell took a vested interest in the ultimate surplus of the rents and profits during the suspense of indefeasible vesting, subject to partial divestment if other children of the sons were born. There are four periods only during which accumulation is permitted by the Thellusson Act—(1.) the life of the settlor; (2.) twenty-one years from the death of the settlor or testator; (3.) the minority of any person or persons living or in ventre sa mère at the death of the settlor or testator; (4.) the minority of any person or persons who would for the time being if of full age be entitled to the income directed to be accumulated. The several periods are, I think, clearly not cumulative, and this has been so decided. For example, where accumulation is directed

from a testator's death it cannot be continued during the minority of a person not then born: see *Longdon* v. *Simson* (1); *Haley* v. *Bannister* (2); *Ellis* v. *Maxwell.* (3) It is also clear upon the Act that a direction to accumulate beyond one of the permitted periods is not void in toto: see *Longdon* v. *Simson.* (1) In *Bryan* v. *Collins* (4) Sir John Romilly M.R. says: "In the case of *Haley* v. *Bannister* (2), Sir John Leach held, that the statute prevented an accumulation of interest during the minority of an unborn child; or, in other words, that the statute referred only to the minority or successive minorities of persons in existence at the time when the will came into effect; and this same point is affirmed and extended in *Ellis* v. *Maxwell.*" (5) In *Ellis* v. *Maxwell* (5), Lord Langdale, after referring to *Longdon* v. *Simson* (1), says: "In *Haley* v. *Bannister* (2) Sir John Leach expressed his opinion to be, that the statute prevents an accumulation during the minority of an unborn child. These cases prevent me from considering, that upon the construction of the Act the accumulation would be lawful during the minority of any grandchild born after the death of the testator." Sir John Leach certainly did say so, but the point did not, I think, arise either in *Haley* v. *Bannister* (2) or in any of the cases which have been cited, the accumulation in all of them, as I understand, having been directed from a period before the birth of the unborn child during whose minority the accumulation was directed. The construction suggested in *Haley* v. *Bannister* (2) appears to me to ignore the words of the statute. It gives no effect to the provision of the fourth period at all, for I can think of no case which upon that construction would come within the fourth period which would not have been covered by the third, and the provision of the fourth period is therefore rendered entirely nugatory. The words of the statute are in my opinion free from ambiguity in this regard, and I think I am bound to give effect to what I conceive to be the expressed intention of the Legislature. In my opinion, therefore, with all deference to the views expressed in the cases referred to, the fourth period

(1) 12 Ves. 295.
(2) 4 Madd. 275, 277.
(3) 3 Beav. 587.
(4) 16 Beav. 14, 17.
(5) 3 Beav. 597.

NEVILLE J. 1907 CATTELL, *In re.* CATTELL *v.* CATTELL.

mentioned in the Act is not confined to the case of persons born in the testator's or settlor's lifetime. In the case of *Jagger* v. *Jagger* (1) Kay J. used words which might bear the interpretation that in his opinion the Court, in considering the question of the validity of a direction to accumulate, will consider what might have happened under it. I think, having regard to the facts of the case before him, that he used them only with reference to which of the periods mentioned by the Act the settlor's direction had regard to; but, if not, I respectfully differ from the view of the learned judge. The Act speaks of a disposition of property: "So and in such manner that the rents . . . . shall be . . . . accumulated for any longer term than," &c. It seems to me that what the Court has to consider is whether the direction complained of has caused or is about to cause accumulation for any longer term than one of those specified. The question here, therefore, is whether a power to accumulate during the minority of Gladys Cattell is good; and that depends upon whether she was a person who under the trusts of the will would for the time being, if of full age, have been entitled to the rents so directed to be accumulated. It seems to me clear that she was; and the only argument against it was that her title to the whole was not indefeasible. That is true, but the statute does not say indefeasibly entitled, but "entitled for the time being." In my opinion, therefore, the ultimate surplus of the rents and profits was properly accumulated by the trustees, and that, subject to the right of the trustees to apply the same for or towards the satisfaction and discharge of any of the principal sums and charges in the will in that connection mentioned, such accumulations sink into the residuary personal estate. This disposes of the questions raised before me.

Solicitors: *Walker, Son & Field, for Smythe, Etches & Jackson, Birmingham; Collyer-Bristow & Co., for Forsyth, Bettinson & Co., Birmingham; Letts Brothers, for R. Davenport, Birmingham.*

(1) 25 Ch D. 729, 734.

J. R. B.

In re SAMUEL ALLEN & SONS, LIMITED.

PARKER J.

1907

Jan. 15, 22.

[00358 of 1906.]

Fixtures — Hire-purchase Agreement — Subsequent Equitable Mortgage — Priority.

A company hired machinery, fixed on its business premises, from L. & H. on the terms of a hire-purchase agreement which provided that the company was to pay a monthly rent for the hire of the machinery, and should become the purchaser on payment of a certain sum, in which event credit would be given for the previous payments of rent. Until the purchase the company was to be a mere bailee of the machinery, and in case of default in making the monthly payments or breach of the conditions of the agreement L. & H. were empowered to enter and remove the machinery.

Subsequently the company gave to a bank an equitable mortgage of the business premises by a deposit of the deeds thereof, accompanied by a written charge under the common seal of the company containing an agreement to give a legal mortgage on demand. The bank took without notice of the hire-purchase agreement. The company failed to pay the instalments and committed breaches of the conditions of the hire-purchase agreement; L. & H. demanded delivery up of the machinery, and a winding-up order was made against the company. The principal secured to the bank was due, with an arrear of interest:—

Held, that the bank being merely an equitable mortgagee, and L. & H. having an equitable interest in the machinery under their hire-purchase agreement, the interest under that agreement had priority over the interest of the bank.

Gough v. *Wood & Co.*, [1894] 1 Q. B. 713; *Hobson* v. *Gorringe*, [1897] 1 Ch. 182; and *Reynolds* v. *Ashby & Son*, [1903] 1 K. B. 87; [1904] A. C. 466, distinguished.

A COMPANY called Samuel Allen & Sons, Limited, was incorporated on June 14, 1904, and acquired a leasehold warehouse and other business premises in Copperfield Road, Mile End, London, E.C.

By a hire-purchase agreement dated July 14, 1904, and made between William Lee and John R. Lee, carrying on business as Lee & Hunt, and thereinafter called "the owners," of the one part, and the company, thereinafter called "the hirers" (described as of 24 and 26, Copperfield Road, Mile End), of the other part, it was agreed as follows:—

(1.) The owners agreed to let to the hirers certain machinery

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specified in the schedule (which was then already fixed to the company's business premises) on the conditions thereinafter contained. (2.) The hirers were to pay 110*l.* 14*s.* on the signing of the agreement in consideration of the option of purchase thereby granted, and were to pay the owners, without previous demand, a monthly rent of 66*l.* 8*s.* 6*d.* for the hire of the machinery so long as the hirers thought fit to continue the hire. (3.) The hirers were to keep the machinery in their own custody and possession at 24 and 26, Copperfield Road, and not to suffer the same to be removed without the consent of the owners and not to interfere with the owners' name-plates or marks upon the machinery. (6.) The hirers were to keep the machinery free and exempt from legal process. (8.) "The hirers may at any time during the hire become the purchasers of the said machinery by paying the sum of 1107*l.* 0*s.* 3*d.*, and in that event credit will be given for all previous payments, including the said sum of 110*l.* 14*s.*" (9.) "When the hirers shall by such payments as aforesaid have paid to the owners the full sum of 1107*l.* 0*s.* 3*d.*, then the said machines shall become the absolute property of the hirers, but until such payment in full the hirers shall merely remain bailees." (10.) In case of default in the monthly payments, or breach of the conditions, or the liquidation of the company, the owners were to be entitled to enter and remove the machinery. (11.) If the owners took possession under clause 10, and the hirers did not exercise an option given to them of purchasing the machinery within a limited time and at a certain amount, the hirers were not to be entitled to any credit allowances or return for or on account of any payments previously made by them.

By an instrument under the common seal of the company, and dated July 24, 1905, and addressed to the London and Provincial Bank, Limited, the company declared that it had deposited with the bank a land certificate and the lease of the premises in Copperfield Road to secure a current account with the bank, and agreed to pay the amount of the account, and charged its business premises, with the appurtenances thereto, with the amount, and agreed to execute a legal mortgage on demand. The lease was at the same time deposited in accordance with the

document. The bank had no knowledge of the hiring agreement. The company made default in payment of some of the instalments under the hire-purchase agreement, and on May 15, 1906, the landlords distrained on the machinery and other articles. The sheriff also seized the machinery and articles under a writ of fieri facias, and they were advertised to be sold by auction, but the sale did not take place.

On October 31, 1906, Lee & Hunt demanded delivery up of the machinery. On November 13, 1906, an order was made for the winding-up of the company by the Court.

The company was then still in arrear of its monthly payments, besides having committed breaches of clause 6 of the hiring agreement, and the sum of 515*l.* 11*s.* 8*d.* was due to the bank under its security. By arrangement the official receiver sold the machinery, and the proceeds of sale were held by him to abide the issue as to who was entitled thereto. In the meantime a summons was taken out in the winding-up by Lee & Hunt against the official receiver, the landlords of the premises in Copperfield Road, and the bank for an order that the official receiver should forthwith deliver to the applicants the machinery upon the premises in the occupation of the company which was let to the company on hire by the hire-purchase agreement of July 14, 1904.

Cave, K.C., and *Rolt*, for the applicants. The title of the applicants must prevail over that of the bank. It is true that the applicants have only an equitable interest in the machinery, but the interest of the bank is only as equitable mortgagee, and, as the applicants' title is prior in point of time, it is to be preferred to that of the bank. No point as to notice arises. Where there was a hiring agreement of a boiler, with power to those letting the boiler to enter and take it away in case of default in payment of the instalments, and then the owner of the land mortgaged it, and the mortgagee, who had no notice of the agreement, allowed the mortgagor to remain in possession, and subsequently the boiler was supplied and fixed to the land, it was held that, on default in payment of instalments, those who had let the boiler could retake: *Gough* v. *Wood & Co.* (1)

(1) [1894] 1 Q. B. 713.

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There the mortgage was a legal mortgage by sub-demise, and the ground of the decision was that the mortgagee, by allowing the mortgagor to remain in possession, had acquiesced in the agreement for fixing and removing the boiler. In *Hobson* v. *Gorringe* (1) the owner of land had mortgaged it in 1894, and in January, 1895, he affixed an engine on it, for trade purposes, which he took under a hiring agreement from the plaintiff. In July, 1895, the mortgage was transferred to the defendant. The defendant took without notice of the hiring agreement, and took possession while the engine was on the land, and it was held that, although the mortgagor had made default in payment of his instalments, the mortgagee had a better right than he to the engine. But in that case the mortgage was a legal one, and the mortgagee, being a purchaser for value without notice and having the legal estate, had clearly the better title. The remarks of A. L. Smith L.J. (2) shew that the plaintiff, who let the engine at hire, had a right which could be enforced in equity. In *Reynolds* v. *Ashby & Son* (3) a mortgage of leasehold trade premises was made before a hiring agreement of certain machines fixed to the premises. The mortgagor failed to pay the instalments, but the mortgagees took possession while the machines were on the land, and it was held that they had a better title than the person who had let the machines to the mortgagor. There, again, the mortgage was a legal one, prior in time, and taken without notice of the hiring agreement. That decision was affirmed by the House of Lords. (4) Where the mortgage is only an equitable one, and is given after the agreement, even if the mortgagee takes without notice of it, his title is postponed to that of the person who has let the goods.

Ward Coldridge, for the official receiver.

A. à Beckett Terrell, for the bank. The right of the owner of the machinery under the hiring agreement to remove it in case of default in payment, is not an equity or equitable interest, at any rate as against a mortgagee. The fact that the mortgage is an equitable one makes no difference. Fixtures annexed to the land pass to the mortgagee without being named, unless

(1) [1897] 1 Ch. 182.
(2) Ibid. 192.
(3) [1903] 1 K. B. 87.
(4) [1904] A. C. 466.

expressly or by inference excluded, whether placed there before or after the mortgage, and whether the mortgage is one in fee, or of leaseholds, or a mere equitable mortgage: Coote on Mortgages, 7th ed. p. 127. An equitable mortgage of a lease gives a good title to fixtures as against the holder of a bill of sale on the fixtures: *Meux* v. *Jacobs* (1); *Longbottom* v. *Berry*. (2) *Hobson* v. *Gorringe* (3) shews that the effect of the hiring agreement and the annexation to the land is that the thing let on hire becomes a fixture and part of the soil, subject, as between the person who let it and the mortgagor, to the right of the former to take it away if his instalments are not paid; but that right imposes no obligation on the grantee of the land. The land is a security to the mortgagee, although his mortgage is only an equitable one. *Reynolds* v. *Ashby & Son* (4) shews that as between a mortgagor and his mortgagee the former has no right to remove fixtures, and no distinction is drawn between a legal and an equitable mortgage.

[PARKER J. referred to *Lee* v. *Gaskell*. (5)]

Cave, K.C., in reply, referred to Amos and Ferard on Fixtures, 3rd ed. pp. 328, 329.

PARKER J. In this case the question which I have to decide is whether the interest of Lee & Hunt, whom I will call "the owners," under a hiring agreement dated July 14, 1904, in certain chattels which were affixed to leasehold premises belonging to the company, was an interest of such a nature as to take priority over the interest of the London and Provincial Bank, the subsequent equitable mortgagees of the leasehold premises. Admitting for one moment that the interest under the hiring agreement is an equitable interest in the land, I think it is reasonably clear that the title of the owners has priority over the title of the subsequent equitable mortgagees. Various cases, to which I will refer shortly, have been cited to me on the general principle of these hiring agreements. The first case referred to was *Gough* v. *Wood & Co.* (6)

(1) (1875) L. R. 7 H. L. 481.
(2) (1869) L. R. 5 Q. B. 123.
(3) [1897] 1 Ch. 182, 192.
(4) [1903] 1 K. B. 87, 99.
(5) (1876) 1 Q. B. D. 700.
(6) [1894] 1 Q. B. 713.

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That case, however, depended upon the mortgagee of the property having given an implied authority to the mortgagor to enter into agreements involving the affixing of machinery to the property, and its subsequent removal by the persons providing it in default of it being paid for as agreed, and I do not think that the case has any direct bearing upon the question before me, although it shows (as is admitted in the present case) that machinery so affixed becomes the property of the owner of the land, at any rate, as between him and the mortgagees. The second case cited was *Hobson* v. *Gorringe*. (1) In that case the circumstances were not the same as in *Gough* v. *Wood & Co.* (2), because the mortgagee, who might otherwise have been held to have given an implied licence with regard to the chattels affixed, had actually entered into possession of the property before the chattels so affixed were removed from the freehold, and that entry into possession was held to be an implied revocation of any implied licence which the mortgagee could have given, so that the chattels then remained the property of the mortgagee, and the hirer had no interest in them. It appears, however, in the judgment of A. L. Smith L.J. in *Hobson* v. *Gorringe* (3) that he conceived that the result might have been different if when the mortgagee took his mortgage he had had notice of the interest of the owner of the chattels under the hiring agreement. In that case the mortgage was a legal mortgage, and unless the mortgagee took with actual notice of the hiring agreement, it is clear that he could rely on the plea of purchase for value without notice. What A. L. Smith L.J. says is (3): "This right"—that is, the right to enter and remove the fixtures—" was not an easement created by deed"—that is quite clear, because there was only an agreement not under seal—" nor was it conferred by a covenant running with the land. The right, therefore, to remove the fixtures imposed no legal obligation on any grantee from King of the land. Neither could the right be enforced in equity against any purchaser of the land without notice of the right, and the defendant Gorringe is such a purchaser "—Gorringe being the mortgagee who had the legal estate.

(1) [1897] 1 Ch. 182. (2) [1894] 1 Q. B. 713.
(3) [1897] 1 Ch. 192.

Now, for what it is worth, I think that passage is in favour of Mr. Cave's contention, and seems to shew that A. L. Smith L.J. thought that, in the particular case he was dealing with, if the legal mortgagee had had notice of the hiring agreement, the decision would have been otherwise than it was. The last case cited to me was *Reynolds* v. *Ashby & Son.* (1) In the judgment of Romer L.J. in the Court of Appeal there is a passage similar to that which I have quoted from the judgment of A. L. Smith L.J. in *Hobson* v. *Gorringe.* (2) What Romer L.J. says (3) is: "With regard to the absence of title in the mortgagor as between himself and the plaintiff, I may observe that the mortgagee was not affected with any notice of the rights of the plaintiff, or for any other reason prevented from claiming these fixtures, which he found forming part of the premises when he entered into possession; and, though the mortgagor knew of the plaintiff's rights, he may well have thought, when the goods were affixed, that he would be able duly to pay for them, and so acquire a good title, and so there was no objection to making them part of the premises subject to the right of the plaintiff to remove them if default in payment for them occurred." Again, Romer L.J. seems to think that had the mortgagee had notice it might have made some difference in the decision. The point, therefore, though not covered by authority, is more or less affected by the dicta of the judges who have decided the cases cited to me. On the other hand, it is said that the hiring agreement is of such a nature that it creates a purely personal right, and not a right which could in any way be enforced in equity against the land, and, therefore, that the purchaser, even of an equitable estate, is not bound by that contract, and that the doctrines of priorities as administered in equity have no application at all.

Now I do not think I should be right if I were to hold that an agreement of this sort was of a purely personal nature. These agreements are very common and very useful, and, of course, it is open to a mortgagee, when he takes his mortgage, to make what inquiries he likes as to whether there are any agreements affecting

(1) [1903] 1 K. B. 87; [1904] A. C. 466. (2) [1897] 1 Ch. 182, 192.
(3) [1903] 1 K. B. 101.

PARKER J. 1907 SAMUEL ALLEN & SONS, LIMITED, *In re.*

the fixtures upon the property. If he does not do so, and is a mere equitable mortgagee, in my opinion he must be held to take subject to those agreements, and I think that those agreements, if they are in the form which has been used in this case, do create an equitable interest by which a subsequent mortgagee who does not get the legal estate is bound, and that, applying the ordinary principles of priorities as between the interest of the hirer under the hiring agreement and the interest created by the equitable mortgage, the interest created by the hiring agreement takes precedence; and on that ground I think that the interest of the bank under its mortgage is postponed to the interest of the persons who own the chattels under the hiring agreement.

Solicitors for applicants: *Rose-Innes, Son & Crick.*
Solicitor for the bank: *A. A. Banes.*

F. E.

PARKER J. 1907 *Feb.* 5.

In re NATIONAL BANK OF WALES, LIMITED.
MASSEY AND GIFFIN'S CASE.

[00195 of 1895.]

Company—Shares—Transfer to Infant Nominee—Winding-up—Contributories.

At the commencement of the voluntary winding-up of a company, in 1893, S. was the registered holder of twenty shares therein, which in April, 1894, he transferred to L. The liquidator, in pursuance of the power given to him by s. 131 of the Companies Act, 1862, sanctioned the transfer and entered the name of L. as holder of the shares in the register of members. In May, 1894, L. transferred the shares, with the sanction of the liquidator, to D., who after a time was registered as the holder of the shares.

The shares were part of a batch of shares purchased from S. by M. and G. (stockbrokers) on the market with a view to a resale, and L., who was their nominee, was a clerk in their employment, and was an infant at the times of the transfers to and by him. D. was also an infant when he became transferee, and this fact was known to the liquidator in 1896, if not earlier.

In 1906, after calls had been made on the shares, but not paid, the liquidator applied that the names of M. and G. might be substituted for that of D. in the register of members and the list of contributories:—

Held, that, as there was no contractual relation, in respect of the shares, between the company and M. and G., the principle of *King's Case*,

(1871) L. R. 6 Ch. 196, applied, and M. and G. could not be placed on the register or list.

Pugh and Sharman's Case, (1872) L. R. 13 Eq. 566, and *Richardson's Case*, (1875) L. R. 19 Eq. 588, distinguished.

Semble, that any equity which the liquidator might have had against L., by reason of the transfer by him to an infant, was abrogated by the laches of the liquidator.

In 1893 it was resolved by special resolution that the National Bank of Wales, Limited, should be wound up voluntarily, and two liquidators were appointed. One of them subsequently resigned, and C. E. Dovey was appointed sole liquidator.

At the date of the commencement of the winding-up Morton Sparke was the registered holder of fifty shares in the company, thirty of which were numbered 14,441 to 14,470 inclusive.

By a transfer dated April 26, 1894, under the hands and seals of Sparke and John Littlejohns, Sparke, in consideration of the sum of 27*l.* 17*s.* 6*d.* expressed to be paid by John Littlejohns, of "11, Beauchamp Street, Cardiff," transferred the fifty shares to Littlejohns.

The liquidator sanctioned the transfer, as it was in his power to do—see *In re National Bank of Wales* (*Taylor, Phillips, and Rickards' Cases*) (1)—registered it, and entered the name of Littlejohns in the register of members of the company in respect of the fifty shares.

On May 30, 1894, by a transfer under the hands and seals of Littlejohns and John Llewellyn Davies, "in consideration of the sum of 2*l.* 9*s.* paid by John Llewellyn Davies, of 110, Reform Street, Portlottyn, student," Littlejohns transferred twenty of the shares, numbered 14,441 to 14,460 inclusive, to Davies.

Davies claimed to be, as he was, a minor at the time of the second transfer, and the name of Littlejohns was accordingly for a time retained on the register of members in respect of the twenty shares, but ultimately Davies was registered as the holder of them.

Calls were made on the shares, but never paid, and in March 1906, a summons in the winding-up was taken out by the liquidator against H. J. Giffin, C. D. Massey, John Littlejohns, and John Llewellyn Davies, asking for an order that the register of shareholders of the company might be rectified by

(1) [1897] 1 Ch. 298.

PARKER J
1907
NATIONAL BANK OF WALES, LIMITED, *In re.* MASSEY AND GIFFIN'S CASE.

substituting therein the names of Giffin and Massey in the place of Davies in respect of the twenty shares, and that Giffin and Massey might be included in the list of contributories of the company in respect of the shares.

The affidavit of the liquidator in support of the summons contained the following statement: "The said John Littlejohns was on the date he purchased the fifty shares of the age of sixteen years, and was in the employ, as office boy or junior clerk, of the firm of Charles Massey & Co., of Cardiff, stockbrokers. Following the common practice amongst Cardiff stockbrokers, when dealing on their own account with shares, the said Charles Massey & Co. used the name of their said employee, John Littlejohns, as their nominee for the purpose of acquiring from Sparke the fifty shares. Inspection of the books of the said Charles Massey & Co. shews that they dealt with the fifty shares on their own account, and that no payment was received by them from the said John Littlejohns therefor." The firm of Charles Massey & Co. at the time consisted of H. J. Giffin and C. D. Massey, who had since dissolved partnership.

Romer, K.C., and *M. J. L. Beebee*, for the liquidator. The names of Massey and Giffin ought to be placed on the register of members and the list of contributories in respect of the twenty shares. Littlejohns was only their alias, and they are, therefore, already on the list, but in a wrong name. Where a man applied for shares in a company in the name of his married daughter, who signed the application without knowing what it was, by the direction of her father, it was held that the father's name must be substituted for the daughter's in the list of contributories: *Pugh and Sharman's Case.* (1)

[PARKER J. referred to *Hardoon* v. *Belilios.* (2)]

Where a man took a transfer of shares, for which he paid, in the name of his infant son, and signed the transfer in the son's name, it was held that the father's name must be substituted for that of the son in the register and in the list of contributories: *Richardson's Case.* (3)

(1) L. R. 13 Eq. 566. (2) [1901] A. C. 118.
(3) L. R. 19 Eq. 588.

"If a person take shares in the name of a fictitious person, or improperly take an allotment or transfer of shares in the name of a person who has never agreed or intended to take them, the real owner will be the contributory": Buckley on Companies, 8th ed. p. 100. Laches is not attributable to an application to put a member on the list of contributories: Ibid. p. 150. [They also referred to Buckley on Companies, p. 45.]

J. G. Wood, for Massey. There was never any contract by Massey with the company that he should become a member of it. If Littlejohns was a trustee for Massey, although Massey may be liable to indemnify him in respect of calls, that does not justify putting the cestui que trust on the register or list. In each of the cases relied on by the liquidator the ground of decision was that the person on the register was merely an alias of the person whom it was sought to put on. In the present case there was simply a purchase on the market by brokers with a view to passing on the shares to other persons who had bought or intended to buy shares through the brokers. The case nearest in point is *King's Case*. (1) There a man purchased shares and had them transferred to his nominee, who was a man of straw; and the Court of Appeal held that the name of the purchaser could not be placed on the list of contributories in the place of the transferee, who was merely his trustee. The opinion was also expressed that, even if the shares had been purchased in the name of a nominee in order to escape liability, the real purchaser could not be made a contributory, inasmuch as he was never under any obligation to the company in respect of the shares. In a similar case Jessel, M.R. refused to put the name of the real purchaser on the list, the ground of his refusal being that "he had entered into no contract with the company": *Williams' Case*. (2) A transfer of shares to an infant is not a nullity, and a transfer by him is in certain circumstances effectual: *Gooch's Case*. (3) The liquidator has been guilty of laches in allowing an infant's name to remain for years upon the register and not giving notice to persons said to be liable, and the delay is fatal to his claim: *Parsons' Case*. (4)

(1) L. R. 6 Ch. 196.
(2) (1875) 1 Ch. D. 576, 579.
(3) (1872) L. R. 8 Ch. 266.
(4) (1869) L. R. 8 Eq. 656.

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R. Rowlands, for Giffin. The attempt to make Giffin liable is the result of a mere afterthought. The delay is fatal to the liquidator's present claim. Before the Infants' Relief Act, 1874, a person who had taken shares as an infant could be placed on the list of contributories after attaining twenty-one, if he had acquiesced in his being treated as a shareholder: *Ebbetts' Case.* (1) A transfer to an infant is not void, but only voidable: *Lumsden's Case.* (2) The Act of 1874 does not affect the infant's position if he so acts, after attaining full age, as to afford evidence of a new promise.

H. Johnston, for Littlejohns. My client has been served with the summons, although no relief is asked against him.

PARKER J. On the evidence before me I think that this application fails.

After the winding-up of the company had commenced the liquidator, in pursuance of the power given to him by the Act of 1862, sanctioned various transfers of shares by persons on the register of shareholders to other persons. Among these was a transfer of fifty shares by one Morton Sparke, the registered holder thereof at the commencement of the winding-up, to Littlejohns, who subsequently transferred all the fifty shares to other persons, twenty of them being transferred by him to John Llewellyn Davies. These transfers by Littlejohns were also sanctioned by the liquidator, acting, I presume, under his statutory power. Ultimately Davies was placed on the register of members as the holder of the twenty shares which are the subject of this application. There was at one time a question whether, when the persons who were on the register at the date of the commencement of the winding-up had subsequently transferred their shares, calls in respect of the shares ought to be made on the transferors or on the transferees; but in *In re National Bank of Wales* (*Taylor, Phillips, and Rickards' Cases*) (3) it was decided that where the liquidator had sanctioned the transfers the calls ought to be made in the first place upon the ultimate transferees.

(1) (1870) L. R. 5 Ch. 302. (2) (1868) L. R. 4 Ch. 31.
(3) [1897] 1 Ch. 298.

Now in 1896 at the latest the liquidator became aware that Davies, the ultimate transferee of the twenty shares, was an infant; and in making out his list of contributories he appears to have made a separate list of transferors to infants, among whom was Littlejohns, his transferee being Davies. Whether that list of contributories contained in its main part the infant Davies himself does not, I think, appear in the evidence, but I do not consider it very material. There is no evidence as to whether the liquidator was or was not aware, prior to 1896, or even from the very first, that Davies was an infant. He would have been aware of this fact had he performed his duty by making inquiry as to the position of each transferee when a transfer was tendered to him for registration. I do not think it is proved that he did not know of the infancy of Davies when he accepted the transfer to Davies; but, assuming that he was not then aware of the infancy, he, at any rate, became aware of it so long ago as 1896. There is however no evidence that then, or at any date prior to 1905, he did what he should have done, namely, give notice of his claim to Littlejohns. Of course, if this transfer had been made by Littlejohns to an infant without the liquidator's knowledge of the transferee's infancy, the liquidator might, although by proper inquiries he could have discovered the facts, have been entitled to say to Littlejohns, "As you have once been validly on the register, you cannot get rid of your liability by transferring to an infant, who may repudiate his liability." But there is no evidence that the liquidator did anything of the sort, and apparently no notice was given to Littlejohns before 1905.

I think that under these circumstances there is a case of delay and laches which would entitle Littlejohns to say, "Any equity which you may have had against me, arising out of the fact that the transfer I made was to an infant, is negatived and entirely abrogated by the delay on your part." But the case does not stop there, because it turns out that Littlejohns was himself an infant when the shares were transferred to him and when he transferred them to Davies. So that, even if he were put on the list of contributories, he would have a right to come off again immediately on the ground that he had been put on as an infant

PARKER J. 1907 NATIONAL BANK OF WALES, LIMITED, *In re.* MASSEY AND GIFFIN'S CASE.

and was entitled to repudiate the shares—for there is no suggestion that he has done anything to prevent his repudiation of liability on the ground of infancy.

If Littlejohns came off, prima facie the person to be put on would be Morton Sparke, the person who transferred to him. Morton Sparke, again, could not, being properly on the register, get rid of his liability as a shareholder until he had properly transferred the shares to someone else, and in ordinary circumstances a transfer to an infant would not free him from liability. But this application is not made against Morton Sparke, and if it were I do not say that it would be successful.

It is alleged, and apparently admitted, that Littlejohns was not the purchaser of the shares, but that Massey and Giffin were the real purchasers of them, and that it was at their instance that the shares were transferred to Littlejohns, who was a clerk in their employment at the time. The question is, whether that alone would give the company any right or equity as against Massey and Giffin, even assuming that any other difficulty were out of the way.

I do not think that I can distinguish this case from *King's Case*. (1) There both James and Mellish L.JJ. draw a broad distinction between the case in which it is sought to put on the register, in the place of a transferee, the person who transferred the shares to him and whose name has already been on the register in respect of the shares, and the case in which it is sought to put on the register a stranger as between whom and the company there has never been any privity of contract whatsoever. In the present case I do not see that there was ever between the company and either Massey or Giffin any contractual relation. The contract of these gentlemen was with Morton Sparke; that contract was to buy certain shares from him. The purchasers would fulfil the contract, of course, by going on the register themselves in respect of the shares which they had purchased, but they would equally perform the contract by providing a transferee who was acceptable to the company. There being, then, no equity arising out of any contractual relation between Massey and Giffin and the company, I think that the principle of *King's*

(1) L. R. 6 Ch. 196.

Case (1) applies, and that the company cannot, at any rate in the absence of Morton Sparke or his executors, treat Massey and Giffin as the persons who transferred the shares and say that, the transfer being a bad one, they ought to be now put on the register in respect of the shares.

It seems to me that both *Pugh and Sharman's Case* (2) and *Richardson's Case* (3), which were cited on behalf of the liquidator, are distinguishable. In both of these cases I think the decision turned upon the fact that there was in reality some contractual relation between the company and the person whose name it was sought to place on the register. In *Pugh and Sharman's Case* (2) there certainly was such a contractual relation, because the person there placed on the list of contributories did make an application for shares in it, and though he made the application in fraud of the company, in the name of his daughter, it was intended by him all along that he should be the real shareholder, the only reason for making the application in his daughter's name being that he already held shares in the company, and could not get the further shares which he wanted if he applied in his own name.

Richardson's Case (3) was simply a case where the purchaser, whose name the liquidator sought to have placed upon the register, had actually signed the transfer, but had signed it in the name of another person who had given him no authority to sign for him and was an infant ; and, therefore, the Court treated the person who had signed the infant's name as the person who had really entered into the contract and consented to go on the register in respect of the shares. Both these decisions, which are based on the ground that the person on the register was merely an alias of the person whom it was sought to put on the register in his place, appear to me to be clearly distinguishable from *King's Case* (1), where the man whom it was sought to put on the register was altogether a stranger to the company.

On all these grounds I think this application must fail. Of course, there is a good deal unknown which might or might not be material, or which, if the decision were delayed, might explain

(1) L. R. 6 Ch. 196. (2) L. R. 13 Eq. 566.
(3) L. R. 19 Eq. 588.

PARKER J. 1907 NATIONAL BANK OF WALES, LIMITED, *In re.* MASSEY AND GIFFIN'S CASE.

what is already known, but I understand that the matter is so old now that those who instruct Mr. Romer are not at all sanguine that any further delay or research would throw any new light upon the matter. In these circumstances the only course I can take is to dismiss the summons with costs.

Solicitors for the liquidator: *Smith, Rundell & Dods, for Vachell & Co., Cardiff.*

Solicitors for the respondents Massey and Littlejohns: *Williamson, Hill & Co., for Ingledew & Sons, Cardiff.*

Solicitors for the respondent Giffin: *Wrentmore & Son, for H. J. Fisher, Cardiff.*

F. E.

PARKER J. 1907 *Feb.* 14, 21, 22.

HALKETT *v.* EARL OF DUDLEY.

Applied. ELLIOTT *v.* PIERSON. [1948] Ch. 452

[1904 H. 2309.]

Vendor and Purchaser—Specific Performance—Defect in Title—Repudiation after Decree for Specific Performance — Evidence — Scottish Document registered in Scotland—Production in England impossible—Secondary Evidence of Contents—Interest on Purchase-money—Costs.

A purchaser's right to repudiate the contract is an equitable right arising from want of mutuality, and may be a defence to an action for specific performance; but in order to avail himself of that defence he must repudiate the contract as soon as he finds that the vendor cannot make a good title.

After a decree for specific performance has been made the purchaser cannot repudiate the contract without the leave of the Court.

A vendor is not bound to produce or procure a covenant for the production of a document which is of record in Scotland, but must furnish sufficient secondary evidence of its contents.

Where an order is made for specific performance, interest on purchase-money is payable from the time when the Master certifies that a good title is first shewn, not from the time when such a title is first shewn as would enable the purchaser safely to take possession.

FURTHER CONSIDERATION AND TWO ADJOURNED SUMMONSES.

In August, 1902, Mrs. Halkett contracted to sell, and the Earl of Dudley agreed to buy, a residential property in Surrey known as Great Fosters. The contract was an open one contained in correspondence. Owing to a change in his plans which would

have prevented him from living at Great Fosters, Lord Dudley did not desire to complete the purchase, and suggested that completion should be postponed. Negotiations on this subject and as to the terms upon which he might be relieved from his contract continued for about two years. These negotiations failed, and on July 13, 1904, Mrs. Halkett commenced an action for specific performance. On January 14, 1905, the Court by consent made the decree for specific performance usual in a vendor's action, and directed an inquiry whether a good title could be made to the property, and, if so, an inquiry when it was first shewn that such good title could be made. The decree was expressed to be made without prejudice to any question as to damages, to the plaintiff being charged with occupation rent, and to any claim as to the plaintiff's right to enforce specific performance with an abatement. No abstract of title had been delivered before the decree, but in February, 1905, the plaintiff delivered an abstract, and in April, 1905, Lord Dudley made a number of requisitions on title. One of these related to a small piece of the property which was subject to restrictive covenants against building. Another requisition related to the trust disposition and settlement in Scottish form of the late Robert Kerr, through whom the plaintiff derived title. The original document was registered in Edinburgh, and there was no covenant or acknowledgment or other means for securing the production of it in England. The plaintiff produced the original official copy of the document and offered to hand over a certified copy, but the defendant insisted on the production of the original. In June, 1905, the plaintiff sent answers to the requisitions. In July further requisitions were delivered, which were answered in August; and in November, 1905, the defendant sent observations on these replies, by which he insisted on his objection with respect to the restrictive covenants and that the certified copy was not sufficient evidence of the Scottish will. By December 8, 1905, the plaintiff had obtained a contract for the release of the restrictive covenants. The matter came before the Master on several occasions and again on December 22, 1905, when the defendant stated that he repudiated, and had previously repudiated, the contract on the ground of want of title. On January 4, 1906, the restrictive

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covenants were actually released. On March 29, 1906, the defendant issued a summons asking that he might be discharged from his purchase, on the ground that at the date of the contract and at the date of the judgment in the action, and at the time when subsequently to the judgment he insisted that the plaintiff had not a good title to the property and had no power to compel a conveyance from any other person, the plaintiff had not a good title, and had no power to convey free from incumbrances and had no power to compel a conveyance from any other person. On November 14, 1906, the Master made his certificate to the effect that a good title had been made, and that it was first shewn on December 8, 1905, i.e., the date when the contract for the release of the restrictive covenants was obtained.

On November 23, 1906, the defendant issued a summons to vary the certificate—(1.) by discharging the finding that a good title could be made, on the ground that the Scottish trust disposition and settlement, or sufficient evidence thereof, had not been produced; and (2.) by discharging the finding that it was first shewn that a good title could be made on December 8, 1905, and by finding in lieu thereof that it had not yet been shewn that a good title could be made, and that at all events it was not shewn before January 4, 1906. Both summonses now came on for hearing, together with the further consideration of the action.

Buckmaster, K.C., and *T. T. Methold*, for the purchaser. Lord Dudley is very unwilling to complete the purchase, and we submit that he should be discharged from his contract. From the moment that the inquiry shewed that the vendor had no title the purchaser was entitled to repudiate the contract: *Bellamy* v. *Debenham*. (1) The Master ought then to have certified that there was no title. There were restrictive covenants on part of this property, and the vendor had no control over them. That is a fatal blot on the title, and cannot be the subject of compensation. The vendor knew this and concealed it from us. The order only declared that the contract was valid; it did not take away any of our rights. The fact that the covenants only applied to a small piece of the property is immaterial; this is a question of

(1) [1891] 1 Ch. 412.

principle, not of amount: *Cato* v. *Thompson* (1); *Rudd* v. *Lascelles*. (2) The reason for the rule is that it is impossible to assess the compensation.

[PARKER J. Those authorities do not apply if the affected part of the property is so small that the Court would, if the vendor had no title to it at all, decree specific performance of the contract, with compensation in respect of that part.]

That is true; but this piece of land, though small, is very important. A purchaser might be able to enforce completion with compensation, but the Court will not force such a title on an unwilling purchaser: *Jacobs* v. *Revell*. (3)

[PARKER J. A general reference to title is for the benefit of both parties. The vendor has up to the date of the certificate to perfect his title; and the purchaser may move to be discharged from the contract. The jurisdiction is discretionary: Dart on Vendors and Purchasers, 6th ed. pp. 1242-1243; *Jenkins* v. *Hiles* (4); *Wynn* v. *Morgan*. (5)]

The purchaser can decline to go on with the contract whenever it is shewn that there is no title. A motion to be discharged is only made in order to give effect to the repudiation. The fact that the purchaser takes no steps at the time to enforce the repudiation does not make the repudiation itself invalid; he cannot be held to a contract which he has not made: *In re Arnold*. (6) When a necessary party to a title is not under the control of the vendor the Master ought at once to report against the title: *Esdaile* v. *Stephenson*. (7) A vendor cannot do anything to perfect his title after repudiation by the purchaser. The order for specific performance made no difference to our right to repudiate; it did not vary the contract, and it did not fix any dates. It said that the contract was to be performed in all its branches, and that includes the right to repudiate.

The other fatal defect in the title is the inability of the vendor to produce in this country the original Scottish trust disposition

(1) (1882) 9 Q. B. D. 616.
(2) [1900] 1 Ch. 815.
(3) [1900] 2 Ch. 858.
(4) (1802) 6 Ves. 646.
(5) (1802) 7 Ves. 202.
(6) (1880) 14 Ch. D. 270.
(7) (1822) 6 Madd. 366.

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and settlement. The legal estate in the property depends upon the effect of that instrument. It is essential that we should see it, and we cannot be compelled to accept production of a copy instead of the original, or to go out of this country to see the original. Where a document is in existence and its position is known, secondary evidence of its contents is inadmissible. It is stated in Sugden on Vendors and Purchasers, 14th ed. p. 431, that if a seller cannot produce the originals, as in the case of wills and records, he must procure office copies of them; but that statement is founded on the Evidence Act, 1851 (14 & 15 Vict. c. 99), which does not apply to Scotland.

Upjohn, K. C., and *MacSwinney*, for the vendor. The purchaser would have had no right to rescind this contract even if we had had no title at all to the little piece of land to which the restrictive covenants applied. It was a trifling matter, which could be met by compensation. However that may be, he did not rescind at the right time; he kept the contract open till after the covenants had been released. The right of repudiation must be exercised at once. Even then he would have had to give us notice to remove the defect within a fixed time: *Green* v. *Sevin.* (1) If he ever had the right to rescind he has waived it. It was a voidable contract which he might adopt or repudiate; and he elected to go on with it: *Lysaght* v. *Edwards* (2); Williams on Vendor and Purchaser, p. 134. Therefore we were entitled to take steps to remove the defects in our title: *Hoggart* v. *Scott* (3); *Eyston* v. *Simonds* (4); *Salisbury* v. *Hatcher* (5); *Murrell* v. *Goodyear.* (6)

The order for specific performance was for the benefit of both parties, and after that neither could repudiate the contract without the leave of the Court. The purchaser was then in a position similar to that of a mortgagee, who, after the usual order nisi for foreclosure and before the foreclosure is made absolute, cannot exercise his power of sale without the leave of the Court: *Stevens* v. *Theatres, Ld.* (7) He could not rescind without the leave of the Court as long as the inquiry was pending. The

(1) (1879) 13 Ch. D. 589.
(2) (1876) 2 Ch. D. 499.
(3) (1830) 1 Russ. & My. 293.
(4) (1842) 1 Y. & C. Ch. 608.
(5) (1842) 2 Y. & C. Ch. 54.
(6) (1860) 1 D. F. & J. 432.
(7) [1903] 1 Ch. 857.

purchaser's argument is inconsistent with *Jenkins* v. *Hiles* (1), *Garnett* v. *Acton* (2), and *Coffin* v. *Cooper*. (3) There had been no order for specific performance in *Bellamy* v. *Debenham*. (4)

The purchaser is not entitled to rescind on the ground that we cannot produce the original Scottish will in this country. It is well established that secondary evidence is admissible of documents which are of record in a foreign country. The statement to that effect in Sugden on Vendors and Purchasers, 14th ed. p. 431, is not founded on the Evidence Act, 1851. It is to be found in the earlier editions published before that Act. The Act does not apply to this case; it refers only to litigious proceedings. In vendor and purchaser questions the proof of documents is left to the common law; and the purchaser must be satisfied with a certified copy: Dart on Vendors and Purchasers, 7th ed. p. 482; Williams on Vendor and Purchaser, p. 101; Taylor on Evidence, 10th ed. pars. 1534, 1535. Further, this will is recited in a deed which was more than twenty years old at the date of the contract, and we are protected by s. 2, r. 2, of the Vendor and Purchaser Act, 1874, and by s. 3, sub-s. 3, of the Conveyancing Act, 1881.

Buckmaster, K.C., in reply. There is no authority for the proposition that a purchaser cannot, after a decree for specific performance, repudiate the contract without the leave of the Court. All the cases are consistent with the principle that, although till something is done the vendor can continue to perfect his title, that right is subject to the power of the purchaser to repudiate. Decisions on foreclosure are not in point. No doubt a mortgagee cannot be allowed by a sale to destroy the property which the Court by the order desires to preserve. We are entitled to a covenant for production of the Scottish will, for without that we cannot make a title.

[*Upjohn, K.C.*, referred to *Fain* v. *Ayers*. (5)]

Attested copies are mere wastepaper against strangers, and cannot be used upon an ejectment: Sugden on Vendors and Purchasers, 14th ed. p. 450. We are entitled to have evidence which would be available in an action for ejectment. The paragraphs

(1) 6 Ves. 646, 655.
(2) (1860) 28 Beav. 333, 337.
(3) (1807) 14 Ves. 205.
(4) [1891] 1 Ch. 412.
(5) (1826) 2 S. & S. 533; 1 Russ. 259, n.

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quoted from Taylor on Evidence do not touch this point, for this will is out of the jurisdiction. This is a good instance of the evil of open contracts; the difficulty should have been foreseen and guarded against. We have made no secret of the fact that we are not insisting on these objections in order to obtain a good title, but with a view to escaping from the contract.

PARKER J. stated the facts and continued:—The purchaser puts his case in this way. He says, first, that a purchaser discovering a fatal defect in the vendor's title has a right to repudiate the contract; secondly, that this right is unaffected by the decree for specific performance; thirdly, that he did repudiate the contract on July 11, 1905, or at any rate on December 22, 1905, before the objection as to the restrictive covenants had been removed; and, further, that his objection to the non-production of the Scotch will, or sufficient evidence thereof, is still a good objection to the title.

Now I think it is reasonably clear on the authorities quoted to me that, before decree, a purchaser who becomes aware of a defect in the vendor's title, which defect cannot be removed without the concurrence of a third party whose concurrence the vendor has no power to require, may (except possibly in the case of trifling matters which the Court would at the vendor's instance treat as matters of compensation or abatement of purchase-money) repudiate his contract, and that such repudiation will be a bar to any relief being subsequently given by way of specific performance at the vendor's instance, even though the defect has been removed before trial. I do not think that this right is more than an equitable right affecting the equitable remedy by way of specific performance. If a vendor contracts that he will, at a future date, convey to a purchaser land which does not at the date of the contract belong to him, but to which he acquires title before the day upon which, according to the contract, the purchase is to be completed, I do not see why, in principle, he should not be able to recover damages for breach of contract if the purchaser fail to complete at the date fixed for completion. If this be so, the right of repudiation in question must be distinguished from the common law right of rescission, and arises

out of that want of mutuality which, unless waived, is generally fatal to relief by way of specific performance. The point is touched on, though it is left open, in the case of *Bellamy* v. *Debenham* (1); and the case of *Salisbury* v. *Hatcher* (2), to which I will refer presently, is further material on the point; but it is in my opinion equally clear that this right of repudiation, whatever be its true nature, must be exercised, if it is to be exercised at all, as soon as the defect is ascertained. If, after ascertaining the defect, the purchaser still treats the contract as subsisting he does not retain the right to repudiate at any subsequent moment he may choose. That is, I think, the effect of the cases which were quoted to me by Mr. Upjohn, namely, *Hoggart* v. *Scott* (3), *Eyston* v. *Simonds* (4), *Salisbury* v. *Hatcher* (2), and *Murrell* v. *Goodyear*. (5) In *Hoggart* v. *Scott* (3) the head-note is this: "The plaintiff in a bill for the specific performance of a contract is entitled to a decree, if, at the hearing, he can shew a good title, although he had not such title at the time of the contract: but the defendant might, if he had thought fit, have retired from the contract, as soon as the want of title was discovered, and was not bound to wait till the plaintiff could acquire a good title." I think that head-note sufficiently states the principle which was laid down in the judgment, and in almost the same words, so I need not further refer to the case.

The next case is *Eyston* v. *Simonds*. (4) In that case a person contracted to sell an estate, without being at the time of the contract entitled to it either at law or in equity, by reason of the alienage of a party through whom he claimed. The purchaser by his own inquiries ascertained the defect of title, but did not, until after some months of negotiation with the vendor, repudiate the contract. The vendor then filed his bill for specific performance, and, pending the investigation of the title in the Master's office, obtained a grant of the estate from the Crown, and it was held that he was entitled to a decree. In that case Knight Bruce V.-C. makes the following observations (6): "Now it appears to me to be very possible, though it is not

(1) [1891] 1 Ch. 412.
(2) 2 Y. & C. Ch. 54.
(3) 1 Russ. & My. 293.
(4) 1 Y. & C. Ch. 608.
(5) 1 D. F. & J. 432.
(6) 1 Y. & C. Ch. 613.

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necessary to decide, that if, at that moment"—that is, the moment the defect was discovered—"the purchaser had held his hand, and had said, A material fact has been concealed and withheld from me, and, therefore, I refuse to complete the purchase—it is possible, under such circumstances, that he could not have been compelled to complete it. I, however, do not decide that point." It had been decided already in *Hoggart* v. *Scott.* (1) Then he goes on to say: "Instead of so acting, the parties continue in negotiation, in the course of which a further opinion is taken on the title; and it is not till the end of the year 1840, this having occurred in 1839, that the matter is broken off. Having regard to what took place in the interval between April, 1839, and October, 1840, having regard to the frame of the answer, to say nothing as to the order which has been obtained, I am of opinion that the point is not now effectually open to the purchaser, but that the decree must be made in favour of the vendor, subject to the payment to the purchaser of all costs up to the report and the confirmation of it, inclusive, and that subsequently to the confirmation no costs should be given on either side."

The third case to which I have referred is *Salisbury* v. *Hatcher.* (2) In that case the head-note is as follows: "Specific performance of a contract for sale of an estate in fee simple decreed in favour of a vendor who at the time of the contract was tenant for life only; the purchaser not having rejected the purchase as soon as he had ascertained the real interest of the vendor, and the vendor being able by means of the consent of the parties interested in remainder to make a good prima facie title to the fee simple at the hearing." In that case the Vice-Chancellor commences his judgment in the following manner: "In cases of specific performance the want of mutuality is a consideration generally material, but it is contrary to principle and authority to say that perfect mutuality is requisite in order to call a Court of Equity into action. There are cases in which plaintiffs have had a decree for specific performance against defendants, who, when the bill was filed, were not in a condition to enforce specific performance in their own

(1) 1 Russ. & My. 293. (2) 2 Y. & C. Ch. 54, 63, 66.

favour. Where no legal invalidity affects the contract, the enforcement of it in this Court is matter of judicial discretion. In this case it has not been contended that there is any legal invalidity. Suppose Mrs. Salisbury to have obtained a legal conveyance of the fee before the time fixed for completion of the contract, and to have done and tendered all other things requisite to be done and tendered. If this were done in sufficient time, she would, I apprehend, have been entitled to recover, at law, on the contract. The contrary, indeed, has not been argued, and I do not understand that on that point the counsel for the defendant desire a case for the opinion of a Court of law. If so, this becomes a case for the judicial discretion of the Court of Equity to which application for specific performance is made." I read that passage primarily because it appears to me to be relevant on the point as to what is the nature of this right of repudiation on which the purchaser in the present case relies, and it really points to the fact that it has nothing to do with the legal right of rescission; it is merely an equitable right arising out of want of mutuality, such as may possibly form the ground of a defence to the peculiar relief given by Courts of Equity, namely, relief by way of specific performance. The Vice-Chancellor then goes on to explain the various circumstances of the case, and later on in his judgment he says this: "In this state of things I am asked, on the ground of want of mutuality, to say that the plaintiff is not entitled to any relief. I should be trampling on all principle and authority, if I were to accede to such an argument. Even if the rule of mutuality, as it has been called, could be carried so far as it has been attempted to be carried in a case of this description, which I do not say, still the conduct of the purchaser has been amply sufficient to exclude him from the benefit of any such argument. With full notice of the state of the title, he pursues the investigation of it, and obtains the fulfilment of a requisition made by himself, and founded on the very state of the title. In my opinion, therefore, to relieve him from the contract would, as I have already said, be contrary to all principle and authority, and discreditable to a Court of justice." It will be seen that the decision in the case, or rather the principle of the decision, rests really upon a waiver

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of the want of mutuality in the contract. I do not know that I need refer to the last case I have mentioned which is to the same effect, namely, *Murrell* v. *Goodyear*. (1)

Now assuming here that the defect of title due to the existence of the restrictive covenants was such a defect as to give rise to the right of repudiation which I have been describing, was such right exercised, or did the purchaser still continue to treat the contract as in operation? I am of opinion that no such prompt repudiation as was required on the part of the purchaser has been proved, but that, on the contrary, he continued after notice of the defect to treat the contract as subsisting, and to make requisitions and objections with a view to an inquiry as to the vendor's title which was proceeding in chambers, an inquiry which would, of course, have been wholly useless if the contract had been effectually repudiated.

It was suggested that the purchaser repudiated the contract as early as July 11, 1905, at an interview or appointment before the Master; but even as late as November 8, 1905, we find him delivering observations on replies to the requisitions, and such observations are not expressed to be made without prejudice to some alleged prior repudiation. The first real attempt to repudiate the contract was, I think, made before the Master on December 22, 1905, when the plaintiff was in a position to compel release of the restrictive covenants, and after that the defendant took no step to give effect to the repudiation until the very end of March, 1906, long before which the covenants had been released.

It is not necessary for me to go so far as to hold that, by not repudiating promptly, the purchaser lost his right of repudiation altogether; but it seems to me that by treating the contract as subsisting after the discovery of the defect he did preclude himself from exercising a right of repudiation at a subsequent time before giving the vendor a reasonable time to cure the defect, and that thereafter his only safe course was to limit the time within which the defect must be removed and a title made out, if the contract was to go through. There is no trace of any such course having been attempted in the present case.

(1) 1 D. F. & J. 432.

As I have said before, as late as November 8 the objection was insisted upon without repudiation, and the defect was in effect cured before the attempted repudiation on December 22 in the same year.

Now hitherto I have assumed that the decree for specific performance did not affect the purchaser's right of repudiation; but I have come to the conclusion that, after a decree of specific performance, a defendant purchaser cannot repudiate the title or the contract without the leave of the Court. Repudiation as a defence to specific performance, arising as I think it does out of the doctrine of mutuality, is, strictly speaking, out of the question after a decree for specific performance has been made, and even if repudiation is treated as a rescission of the contract founded on some doctrine of law, I do not think that a Court of Equity would allow rescission without application to itself for leave so to do. The proper course for the purchaser, on discovery of a defect of title such as might, but for the decree, give rise to a right of repudiation, is to move to be discharged from the contract. Even if he does so move I do not think he would be entitled to be discharged as a matter of course. A decree for specific performance enures for the benefit of both parties, and on the reference as to title a vendor is not confined to shewing such title as he had at the date of the decree, much less to such title as he had at the date of the contract, but may perfect his title at any time before certificate. On the other hand, the purchaser is not confined to objections taken by him before or at the hearing. Even if the certificate be adverse to the title, an application by the purchaser to be relieved may be refused if, at the hearing of the application, the vendor has perfected his title; and the same rule applies to the further hearing of the action upon the certificate. In each case it seems to me that the Court will consider the circumstances, and grant the relief, or refuse relief, as may appear to be equitable. What I have stated to be the principle of the Court is, I think, shewn to be such by the cases which were quoted before me during the arguments. I may refer in particular to the case which Mr. Buckmaster quoted of *Esdaile* v. *Stephenson*. (1) That states

(1) 6 Madd. 366.

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shortly the difference between a matter of title and a matter of conveyance, and points out that, where the vendor cannot control the person whose consent or concurrence in the conveyance is necessary, it is a question of title and not of conveyance, though it might be otherwise if the vendor has a power to control and compel such concurrence or consent. In that case the Vice-Chancellor says "that if the Master should report against the title, and at the hearing, upon further directions, the vendor had cured the defect, the Court would then compel the purchaser to take the title, although it would not suspend the contract with a view to a future proceeding to perfect the title; that if the fact, whether the vendor could at the hearing cure the defect were in question, it must be then sent back to the Master to review his report with the additional circumstances."

Then there was also the case of *Coffin* v. *Cooper* (1), the head-note of which is this: "Purchaser cannot insist on being discharged upon a report of defective title, if capable of being made good within a reasonable time; as to which the vendor will be put under terms." In that case it was argued that there was a rule that if the vendor cannot make a title at the date of the report the purchaser has a right to be discharged; and the Lord Chancellor says this: "There is no such rule as is suggested. Where the Master's report is, that the vendor, getting in a term, or getting administration, &c., will have a title, the Court will put him under terms to procure that speedily. In *Whittaker* v. *Whittaker* (2) Sir Robert Mackreth wished very much to be discharged from the contract; and Lord Kenyon would not hold, that the vendor was to be bound during six years, while all Mr. Wilkinson's affairs were winding up." In that case it appears that the title had been made good after the report by an Act of Parliament; and it is the case, I think (though it is not quoted under the particular letter referred to), on which the editors of Dart on Vendors and Purchasers, 6th ed. p. 1243, found the following observation: "So if, the certificate being against the title, and there being no application to discharge or vary it, the purchaser moves that he may be discharged from the contract, the vendor may shew that the title has been perfected

(1) 14 Ves. 205. (2) (1792) 4 Bro. C. C. 31.

subsequently to the certificate; for example, by a private Act of Parliament."

Then there is the case to which I referred in the course of the argument, namely, *Jenkins* v. *Hiles* (1), where I think the same principle is recognized; but the greater part of the case has to do with other matters. Lord Eldon in that case says: "It is impossible to deny, that upon the old authorities a specific performance might be obtained, if the title could be made good before the report. The Court would execute the contract then; regard being had to the justice due to particular cases"; and he treats that as the rule founded upon the earlier authorities.

There was a case also, *Wynn* v. *Morgan* (2), which, though not precisely in point, is yet, I think, worth referring to. The head-note is this: "Where the time, at which the contract was to be executed, is not material, and there is no unreasonable delay, the vendor, though not having a good title at the time the contract was to be executed, nor when the bill was filed, but being able to make a title at the hearing, is entitled to a specific performance." Of course that makes the same principle applicable up to the hearing where no plea, at any rate, of want of mutuality could be taken advantage of, or was, in fact, raised by the answer.

Now it seems to me that these cases are really inconsistent with the principle for which the defendant contends, and that in an action for specific performance there are reasons against the possibility of repudiation or rescission without the leave of the Court equally strong as those which, in a foreclosure action, prevail against the right of the mortgagee to sell without the leave of the Court, as to which I may refer to *Stevens* v. *Theatres, Ld.* (3) I think therefore, so far as the restrictive covenants are concerned, the applicant's case fails.

With regard to the Scottish will, it is proved that such a will is in Scotland matter of record, and that production of the record in this country is quite impossible. I do not think that there is any obligation on a vendor either to produce or procure a covenant for the production of a document of record, or indeed of

(1) 6 Ves. 646, 655. (2) 7 Ves. 202.
(3) [1903] 1 Ch. 857.

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any document which it is in fact impossible to produce; he is, however, bound to furnish sufficient evidence of its contents. It is said that the Act of 14 & 15 Vict. c. 99 has no reference to a Scottish will, and therefore no secondary evidence can be produced. Now it does appear that this Act has no application to a Scottish will, but long before it was passed foreign and colonial records could be proved by appropriate secondary evidence, and I do not think that the Act (which was intended to simplify the proof of such records in certain cases) can be said inferentially to abrogate the common law in cases to which it does not apply. I take the common law principle to be that when a party proves that he is not in a position to adduce the primary evidence, for example, that the document in question is lost or cannot be found, or that it is of record in a foreign country the laws of which do not admit of its production, he is at liberty to give secondary evidence of its contents. I do not entirely assent to the proposition that a vendor is in every case bound to supply evidence which would be admissible in an action for ejectment. The vendor in the present case has produced the official extract which, in Scotland, answers to an English probate; he has also procured and handed over a certified copy of the original, and, having done so, he has, in my opinion, done all that could be reasonably required of him.

In my opinion, therefore, the defendant is also wrong on the second question that has been argued.

With regard to the date when a title was first shewn, I think that after December 8, 1905, when the plaintiff obtained an agreement for the release of the covenant, the matter ceased to be a question of title and became a question of conveyance only, and that, therefore, the Master's certificate is right.

It follows that both the summonses fail, and must be dismissed.

Upjohn, K.C. No date was fixed for completion, so interest on the purchase-money should be paid from December 8, 1905, the date when a good title was first shewn as found by the certificate. That was the date when the purchaser might

prudently have taken possession: *Enraght* v. *Fitzgerald* (1); *Binks* v. *Lord Rokeby* (2); Dart on Vendors and Purchasers, 7th ed. pp. 652, 653; *In re Cary-Elwes' Contract.* (3) Then we ask for an inquiry as to damages.

[PARKER J. You would not be entitled to damages for delay before the date of the certificate. It will not be worth while to have an inquiry as to damages for so short a time.]

We must leave that to your Lordship. Further, we ought not under the circumstances to be charged an occupation rent. The property had to be kept in repair, and the purchaser should have taken possession on December 8, 1905, at the latest: *Dakin* v. *Cope.* (4) There should be an inquiry whether there has been a beneficial occupation, and, if so, what occupation rent should be charged.

[PARKER J. The usual form is an inquiry whether any and what occupation rent ought to be charged.]

That will be sufficient. Further, we ask for the costs of the action. There is no general rule that vendors pay costs up to the time when a title is shewn: *Croome* v. *Lediard* (5); and all costs are now in the discretion of the Court. Nothing was said about costs in the order for specific performance.

[PARKER J. In Morgan and Wurtzburg on Costs, 2nd ed. p. 254, the rule is stated to be general.]

The authorities do not support that proposition: *Phillipson* v. *Gibbon.* (6) A distinction should be drawn between costs up to trial and costs afterwards. Here the purchaser has avowedly tried every means to escape from his contract, and he ought to pay all the costs, at all events up to trial: *Eyston* v. *Simonds* (7); *Monro* v. *Taylor* (8); *Burnaby* v. *Equitable Reversionary Interest Society.* (9)

Buckmaster, K.C. The order for specific performance enured for the benefit of both parties. Interest only runs from the date when the contract ought to have been completed, i.e., the date of

(1) (1842) 2 D. & War. 43.
(2) (1818) 2 Swans. 222.
(3) [1906] 2 Ch. 143.
(4) (1827) 2 Russ. 170.
(5) (1834) 2 My. & K. 251.
(6) (1871) L. R. 6 Ch. 428.
(7) 1 Y. & C. Ch. 608, 613.
(8) (1852) 3 Mac. & G. 713.
(9) (1885) 28 Ch. D. 416.

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the Master's certificate. We could not safely complete before the date of the certificate; the Master might have reported against the title. At all events, the title was not made complete till January 4, 1906, when the covenants were released, and interest cannot be payable before that. December 8, 1905, was only the date when a good title was shewn for the purposes of the abstract, not for the purposes of taking possession. The plaintiff ought to pay an occupation rent in the ordinary way from the same date as that from which interest begins to run, for she has always insisted on full rights of occupation. The expression "if any" must not be taken to mean that, even though she has been in occupation, she may not be charged an occupation rent.

[PARKER J. Those words will not prejudice you if there has been any beneficial occupation.]

Then the only other question is the inquiry as to damages, and that is no longer insisted on.

PARKER J. The object of the inquiry was really to ascertain, amongst other things, from what date the interest ought to run on the purchase-money. It is quite true that in one of the cases which have been cited the inquiry was of a somewhat different nature, but I do not think I ought to say that the ordinary inquiry for that purpose, which has been well known in specific performance decrees for generations, is wrong in form, and, instead of being an inquiry as to when the title is first shewn, ought to be an inquiry as to when a title could be first shewn in respect of which possession might be taken. I think really they are the same thing and that, therefore, interest at 4 per cent. ought to run from the date when the Master has certified that title was first shewn. I think there ought to be an occupation rent as far as at any rate this lady has continued, after the date fixed by the Master's certificate as the date when title was first shewn, in possession in the same way as she was before. I do not say necessarily if she had left it and put in a caretaker she ought to pay occupation rent; therefore I think the best plan will be to direct an inquiry as to whether after December 8, 1905 (the date from which interest begins to run), she ought to be charged with any, and what, occupation rent, and for what period.

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Then, with regard to the costs, the usual rule is clear that in an ordinary case the vendor pays the costs up to the date when title was shewn, but I have no doubt that really the reason for the original action for specific performance in this case was that there was a most unwilling purchaser, and I think under the circumstances justice would be done between the parties by making the defendant pay the costs of the action up to and including the order made on the trial, and by making the vendor in the usual way pay the costs of the proceedings in chambers down to December 8, 1905, and by giving no subsequent costs. There will be one order on the two summonses and on further consideration, and a set-off of the costs.

Solicitors: *Burgess, Taylor & Tryon; May, How & Chilver.*

H. C. R.

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March 7.

PEEL *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY (No. 2).

[1905 P. 2500.]

Practice—Costs—Counsel's Fees—Three Counsel—Taxation—Rules of Supreme Court, Order LXV., *rr.* 8, 27, *sub-rr.* 29, 38.

Order LXV., r. 27, sub-r. 29, has not altered the practice of the Court with reference to a review of the taxing Master's decision on the allowance or disallowance of the fees of a third counsel employed by one of the parties in a case. The old authorities still apply; and in deciding whether the costs of three counsel ought to be allowed the Court can take into consideration the length of the documents that had to be examined, the length of time the case was likely to last, the fact that large sums are involved, and that the case is of commercial importance; but the commercial importance of the case, the importance of the issues, and the great public interests involved are not by themselves sufficient reasons for allowing the costs of a third counsel.

SUMMONS TO REVIEW TAXATION.

A controversy had been going on for some years between the directors of a railway company and a body of shareholders with reference to questions of policy affecting the management of the company. Previously to the half-yearly general meetings called for February and August, 1905, the directors sent to each

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shareholder a circular setting out the facts and the views of the directors and asking the support of the shareholders at the meeting; with this was enclosed a stamped proxy paper containing the names of three of the directors as proxies, with a stamped cover for return. The expenses of printing, posting and stamping these documents was paid for out of the funds of the company. Officers and servants of the company had also been directed to call upon some of the shareholders with a view to obtaining their votes for the directors. Some of the shareholders brought an action to restrain the company and the directors from using the funds of the company in paying expenses thus incurred. The trial of the action before Warrington J. occupied a very short time, there being no dispute as to the facts, and it being admitted that the Court was bound by the decision in *Studdert* v. *Grosvenor*. (1) Only one counsel was heard for the defendants. His Lordship accordingly, without expressing any opinion of his own, granted the injunction. The defendants appealed. Their appeal was allowed with costs; and it was held that it was the duty of the directors to inform the shareholders of the facts, of their policy, and the reasons why they considered that this policy should be maintained and supported by the shareholders, and that they were justified in trying to influence and secure votes for this purpose, and, accordingly, that expenses which had been bona fide incurred in the interest of the company were properly payable out of the funds of the company.

The hearing of the appeal was stated to have occupied less than a day; only one counsel being heard for the appellants and no reply being called for. The case is reported. (2)

The taxing Master proceeded to tax the defendants' costs, and in doing so he allowed the costs of three counsel employed by them at the trial and on the appeal. The plaintiffs took objections to the items charged in respect of the third counsel, and the taxing Master, in answer to these objections, said: "This is a case which is in my opinion of the very greatest importance, not only to the defendants, but to all other railways and public companies, and is by its nature likely to prove the leading case on the subject, and it appears from the correspondence that the

(1) (1886) 33 Ch. D. 528. (2) Ante, p. 5.

dispute between the said parties hereto had been going on for some years. It is true no question of technical or scientific importance was raised, nor was there a great mass of documents (although the documents accompanying the brief exceeded 1500 folios in length), nor many witnesses. But, having regard to the commercial importance and vital nature of the claim, the importance of the issues and the great interests involved, I am of opinion that it would not have been reasonable or prudent for the defendants to have the case tried without the assistance of a third counsel. A great point was made before me that it was unnecessary for the defendants to have taken the proofs of any of their witnesses as to the custom of railways in sending out proxies, but I find, as a fact, that the plaintiffs did not admit the custom (thereby rendering such witnesses unnecessary) until the case was heard in Court. The plaintiffs evidently thought that the case was of great importance to them, as it appears that they also had the services of three counsel. I have therefore, after the gravest consideration, and in the exercise of my discretion, allowed to the defendants the costs of the employment of three counsel, both in the Court of Appeal and the Court below, and have disallowed the said objections of the plaintiffs."

The plaintiffs now asked that their objections might be allowed, and that the taxation might be referred back to the taxing Master to vary his certificate accordingly.

Clauson, for the summons. There is no reported case in which three counsel have been allowed except where the proceedings have been very lengthy or complicated or there have been a great many witnesses. The taxing Master's discretion is not final on this point, and the reasons which he gives for his decision are obviously insufficient. They are quite inconsistent with the judgment of the Court of Appeal in *Glamorgan County Council* v. *Great Western Ry. Co.* (1) The rule is laid down in *Smith* v. *Earl of Effingham* (2); *Pearce* v. *Lindsay* (3); *Attorney-General* v. *Munro* (4); *Smith* v. *Buller* (5); *Kirkwood* v. *Webster* (6); *Mason* v.

(1) [1895] 1 Q. B. 21.
(2) (1847) 10 Beav. 378, 385.
(3) (1860) Joh. 702.
(4) (1849) 1 Mac. & G. 213.
(5) (1875) L. R. 19 Eq. 473.
(6) (1878) 9 Ch. D. 239.

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Brentini (1); *Le May* v. *Welch.* (2) There were no special circumstances in this case to justify the employment of three counsel.

Martelli, for the defendants. This is a question for the discretion of the taxing Master, and his decision is binding unless the Court holds that he has mistaken the principle on which he should have acted: *Fenton* v. *Crickett.* (3) All the cases which have been cited were before the new rule on the subject—Order LXV., r. 27, sub-r. 29. By that rule, "On every taxation the taxing Master shall allow all such costs, charges and expenses, as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party." The rule has altered the practice; this is now within the taxing Master's discretion, and the authorities do not apply. He now has a twofold discretion, that conferred on him by Appendix N and also a general discretion under the new rule: *In re Ermen* (4); *Cavendish* v. *Strutt.* (5)

In the exercise of that discretion the taxing Master was right in allowing the costs of a third counsel. Order LXV., r. 27, sub-r. 38, shews the considerations on which the discretion is to be exercised. They include "the nature and importance of the cause or matter, the amount involved, the interest of the parties, the fund or persons to bear the costs, the general conduct and costs of the proceedings, and all other circumstances." The cases in which the Court will interfere with the taxing Master's discretion are stated at p. 958 of the Annual Practice, 1907, but there is no exhaustive definition of the cases in which three counsel will be allowed. It never was the rule that great length of time or complication was necessary to justify the employment of three counsel, and it is still less the rule now. Such a limit would be inconsistent with the new rule.

The taxing Master was right even under the old practice. He has followed the rule laid down in *Kirkwood* v. *Webster.* (6) The costs of three counsel were allowed in *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (7) on similar

(1) (1880) 42 L. T. 726.
(2) [1885] W. N. 180.
(3) (1818) 3 Madd. 496.
(4) [1903] 2 Ch. 156, 162.
(5) [1904] 1 Ch. 524.
(6) 9 Ch. D. 239.
(7) (1889) 60 L. T. 753.

grounds to those advanced by the taxing Master in this case. The importance of the case has to be considered, and it would be impossible to exaggerate the importance of this case. The parties represented enormous interests; there was a very important legal question; and expense was of no consequence to the parties. The test suggested in *Kirkwood* v. *Webster* (1), viz., whether the case is one "in which a reasonable and prudent man acting with ordinary prudence would not have ventured to come into Court without three counsel," really depends on the wealth of the parties.

Clauson, in reply. In order to succeed the defendants must shew that the costs of a third counsel are not an unusual expense. Order LXV., r. 27, sub-r. 29, expressly excepts costs "which appear to the taxing Master to have been incurred or increased through over-caution, negligence or mistake or by payment of special fees to counsel or special charges or expenses to witnesses or other persons, or by other unusual expenses." Order LXV., r. 27, sub-r. 38, does not refer to the wealth of the parties, but to cases in which trustees or executors are suing. The taxing Master was justified in taking these things into consideration, but he should not have attributed so much weight to them.

PARKER J. I have come to the conclusion that the alteration which took place in 1902 in the rules relating to taxation—an alteration which consisted, at any rate in part, of the introduction of a new rule, Order LXV., r. 27, sub-r. 29—does not alter the practice of the Court with reference to a review of the taxing Master's decision on a question such as the allowing or disallowing of the fees of three counsel employed in a case. The rule does alter the principles of taxation, as pointed out by Farwell J. in *In re Ermen* (2), to this extent, that it gives the taxing Master a wider discretion in some cases than he had before. But it must be remembered that, even before the introduction of this rule, the allowing or disallowing of three counsel was in a sense within the discretion of the taxing Master, otherwise he never could have embarked on the inquiry whether three counsel

(1) 9 Ch. D. 239. (2) [1903] 2 Ch. 156.

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should or should not be allowed. I do not think that his discretion with regard to that is altered at all by the introduction of sub-r. 29. As Mr. Clauson pointed out, the employment of three counsel now, just as much as it always was, is an unusual expense in a litigation. I think it is the duty of the Court on the decisions to come to a conclusion itself upon a summons to review the taxing Master's decision in a matter of this sort, and that it is impossible for the Court to shelter itself behind the taxing Master's discretion in considering the point. I do not know that one ought to—and certainly I do not intend to—try to define exhaustively the cases in which three counsel ought to be allowed. But the general principles applicable to the question are, I think, sufficiently laid down in the cases which have been cited. In the first place I start with the fact that it is not a usual expense which ought to be paid by one of the adverse parties in a hostile litigation, but that the onus lies upon the person who claims that three counsel ought to be allowed to shew that there is a special case for such allowance. Now, what ought he to shew in order to make out a special case? In the various cases which have been quoted many considerations influencing the tribunal which has to decide the point have been mentioned. Starting with the case of *Smith* v. *Earl of Effingham* (1), we have it that the taxing Masters of that day laid stress upon three points, the first being what is referred to as the great importance of the case; secondly, the extent of the evidence; and, thirdly, the time likely to be occupied by the case when it comes on for hearing. Another consideration, weight to which was given in *Pearce* v. *Lindsay* (2), was whether the length of the evidence taken on inquiries in chambers made it possible or impossible to have justice done at a less expense than that involved in the employment of three counsel. In *Smith* v. *Buller* (3) it was stated that in considering the matter attention ought to be paid to the nature of the case, the length of the evidence, and the subject-matter of the suit. Fry J. in *Kirkwood* v. *Webster* (4) appears to define the point at issue as whether it is essentially necessary for the purposes of justice to employ

(1) 10 Beav. 378.
(2) Joh. 702.
(3) L. R. 19 Eq. 473, 480.
(4) 9 Ch. D. 239.

three counsel, or, in other words, whether a prudent man could have ventured to come into Court without three counsel. I think it may be noticed there that it is important to distinguish that question, the question whether a prudent man would have ventured into Court without three counsel, from another question which Mr. Martelli suggested—namely, whether the parties, if acting prudently, would employ three counsel. One is the question of doing the litigation, if I may use the expression, as cheaply as a reasonable man can do it, because possibly someone else may have to pay the expense, and the other is a question what a man spending his own money would reasonably be expected to do in the particular circumstances of the case. There is a case before Kekewich J.—*London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (1)—where he intimated that the importance of the case—an expression used in some of the previous cases referred to—both to the parties, and as a commercial matter to the community, was to be taken into consideration on the question of whether or not three counsel ought to be allowed; but in this particular case there was another element which, according to the older cases, is important, namely, the length and complication of the evidence, and this may have also influenced the judge in coming to the conclusion that the case he was dealing with was one in which three counsel were required. I think myself that in a case of complication, where the evidence is long, and where the hearing is likely to last for a considerable time, the additional fact that the case is an important one both pecuniarily to the parties and commercially to the community may have weight. Indeed I am not prepared to go so far as to say that even in a simple case the importance of it pecuniarily to the parties and the commercial importance of it to the community—importance in point of view of the law, to express it in other words—may not conceivably be sufficient to justify the employment of three counsel. But it is not necessary for me to decide that point.

Here we have what I think was really an extremely simple case. I agree that from the point of view of many other companies it involved questions of considerable importance, and

(1) 60 L. T. 753.

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it would also involve questions of importance to the parties themselves. It arose out of a difference of opinion between certain shareholders or stockholders of the London and North Western Railway Company and the directors, and the question simply was whether it was within the powers of the directors, according to the special Acts of the company which incorporated the Companies Clauses Acts, to act in a certain manner with regard to using the funds of the company for circularizing shareholders and sending out stamped proxies and otherwise. One would have thought no evidence was really necessary to try that point of law, and as a matter of fact no evidence was called. Certain witnesses were subpœnaed because it was alleged in the pleadings that the directors of similar companies were accustomed to act in the way that the defendant company was accused of acting, and that was supposed to be relevant to the issue; but as a matter of fact the custom and course of action were admitted at the trial, and no evidence was called. There was a considerable amount of correspondence, which was briefed. I do not know how far it was gone into at the trial, but that correspondence was only useful as shewing historically how the question arose. There was no charge of want of bona fides against the directors. If there had been, it might have involved evidence, and if the directors had not acted bona fide the decision might have been different. But it was admitted at the trial, and it was not traversed in the pleadings, that there was no want of bona fides. Therefore we simply have a question of law, no doubt an important question, arising on the construction of the statutes relating to the defendant company either under its special Acts or the general Acts incorporated therewith. I cannot myself see why in such a case it was necessary for the prudent person, endeavouring to get justice, but endeavouring to get justice without any undue expenditure of money, to employ more than two counsel in the ordinary way. If I were to decide that three counsel might in such a case be legitimately employed, and the extra cost legitimately thrown on the losing party, it appears to me that in very many cases which are comparatively simple in their nature, which can be decided without any complicated inquiry into documents, and without occupying

more than a few hours of the time of the Court, in many cases of that nature three counsel might be allowed merely because the result of the decision might be commercially important or important to the community in other ways, as, for example, by affecting the rights of hundreds of thousands of workmen under the Workmen's Compensation Acts. I do not think the practice of the Court has ever been or ought to be so laid down as to include cases of that sort. In my opinion, in order to allow the costs of three counsel, there ought to be some special matter of complication, and in judging whether there is such complication the Court can consider the length of the documents that have to be examined, and the length of time the case is likely to last; and may also take into consideration the fact that large sums are involved, and possibly that the case is of commercial importance. But the mere commercial importance of the case does not, in the present instance, seem to me to justify what the taxing Master has done. His answer to the objection is simply this: "It is true no question of technical or scientific importance was raised, nor was there a great mass of documents (although the documents accompanying the brief"—that was mainly the correspondence—"exceeded 1500 folios in length), nor many witnesses." No witnesses were called. "But having regard to the commercial importance and vital nature of the claim, the importance of the issues, and the great interests involved"—those must be the great public interests, I think, because no one can measure the interests pecuniarily of the minority who were trying to control the action of the directors—"I am of opinion that it would not have been reasonable or prudent for the defendants to have the case tried without the assistance of a third counsel." I disagree with that. Reluctant though I am to differ from the taxing Master, I am bound to express my own opinion, and the only course I can pursue is to send the matter back to him for review, with an intimation that only two counsel ought to be allowed.

Solicitors: *Freshfields; C. de J. Andrewes.*

H. C. R.

C. A. 1907 *April* 16.

BOURNE & TANT *v.* SALMON & GLUCKSTEIN, LIMITED.

[1906 B. 854.]

Landlord and Tenant—Covenant by Lessor to pay Rates—"All Rates and Taxes payable in respect of the demised Premises"—Water Rate.

The underlease of a shop and basement forming part of a large block of buildings contained a covenant by the lessor to procure to be paid "all rates and taxes payable in respect of the demised premises." Water was supplied for domestic purposes to the whole building and charged for in one rate which had been hitherto paid by the superior lessees:—

Held (affirming the decision of Buckley J., who felt himself bound by *Direct Spanish Telegraph Co.* v. *Shepherd*, (1884) 13 Q. B. D. 202), that the water rate was a "rate" within the meaning of this covenant which was payable by the lessor.

The question raised by this appeal was whether water rate was included in a covenant by a lessor to pay "all rates and taxes" payable in respect of the demised premises.

By a lease of July 16, 1903, the Prudential Assurance Company, Limited, demised a large block of buildings at the corner of Gray's Inn Road and Holborn, known as 150, Holborn to Heywood & Co., Limited, for twenty-one years at a rent of 1000*l.* per annum. This lease contained a covenant by the lessees at all times during the said term to pay and discharge all sewers rate, main drainage rate, improvement rates, and all other taxes, rates, duties, assessments, outgoings and impositions whatsoever, whether parliamentary, parochial or otherwise, which then were, or at any time thereafter might be, assessed, charged or imposed upon the said demised premises, or on the owner or occupier in respect thereof.

By an underlease of September 30, 1904, Heywood & Co., Limited, demised two shops on the ground floor of 150, Holborn and the basement to Salmon & Gluckstein, Limited, for the residue of the original term of twenty-one years, less one day, at 800*l.* per annum. This underlease contained a covenant by the lessors to pay all rates and taxes in respect of the demised premises in

practically the same terms as the covenant entered into by them with their lessor by the lease of July 16, 1903.

By an underlease of December 16, 1904, Salmon & Gluckstein, Limited, demised one of the shops and the basement so leased to them as aforesaid to the plaintiffs Messrs. Bourne & Tant for the residue of the original term of twenty-one years, less seven days, at 500*l.* per annum. By this underlease the lessors covenanted that they would at all times during the said term "procure to be paid all rates and taxes payable in respect of the said demised premises." At the date when this underlease was granted water was supplied for domestic purposes to the whole building by the Water Board and charged for in one rate, which had hitherto been paid by the superior lessees of the whole building, and there was no separate supply to, or separate assessment in respect of, the premises included in the underlease to the plaintiffs, the lavatories and water-closets in this holding being supplied in common with the rest of the whole building from the main supply.

In January, 1906, the defendants applied to the plaintiffs for payment of a sum of 9*l.* 1*s.* 7*d.*, which they alleged that the plaintiffs were liable to pay as a contribution towards the water rate, and, as this was objected to, an originating summons was taken out to determine the question whether, notwithstanding the covenant by the lessors in the underlease of December 16, 1904, the plaintiffs as lessees were liable to pay to the defendants any proportion of the water rate assessed upon the whole of the buildings known as 150, Holborn in respect of water supplied for domestic purposes.

Buckley J., considering himself bound by the authority of *Direct Spanish Telegraph Co.* v. *Shepherd* (1), held that the water rate was a "rate" within the meaning of the covenant which must be paid by the defendants the lessors.

The defendants appealed.

Macmorran, K.C., and *Daldy*, for the appellants. *Direct Spanish Telegraph Co.* v. *Shepherd* (1), upon which the learned judge in the Court below based his decision, can no longer be

(1) 13 Q. B. D. 202.

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supported, and must be taken to be overruled by *Badcock* v. *Hunt* (1); if not actually overruled by the later decision, it is inconsistent with it and ought to be overruled now. A water rate is not a "rate" imposed on or in respect of the premises; it is a mere payment for a supply of water—that is, a payment for goods sold and delivered, the price being determined by reference to the annual value of the premises occupied. An occupier is not bound to take water from the water company; the water is supplied to him only if demanded. The private Act governing the supply of water to these premises is the New River Company's Act, 1852 (15 & 16 Vict. c. clx.), the material portions of which are set out in *In re Floyd.* (2) The expression "water rate," as defined by the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), which is incorporated with the New River Company's Act, includes, s. 3, "any rent, reward, or payment for a supply of water"; it is payable by and recoverable from the person requiring, receiving, or using the supply of water (s. 68); it is payable in advance (s. 70); and is recoverable by action or proceeding before justices (s. 74): it is therefore clearly a personal demand, and not a charge on or payable "in respect of the premises." The covenant here is to the same effect as the covenant in *Badcock* v. *Hunt* (1), which is a direct decision that water rate is not a "rate" within the meaning of a covenant of this kind. The only "rates" intended to be provided for by this covenant are rates like the poor rate or London County Council rate, which are a charge upon the occupier in respect of his possession.

[COZENS-HARDY M.R. The Court of Appeal in *Badcock* v. *Hunt* (1) do not seem to have considered that they were deciding anything contrary to the decision in *Direct Spanish Telegraph Co.* v. *Shepherd.* (3) Lord Esher M.R. says (4): "it is unnecessary to consider whether that case is rightly decided or not."]

The two cases are inconsistent. *Direct Spanish Telegraph Co.* v. *Shepherd* (3) is practically overruled by the later case; and this is not the kind of case referred to there of flats at an inclusive rent.

(1) (1888) 22 Q. B. D. 145.
(2) [1897] 1 Ch. 633, 634.
(3) 13 Q. B. D. 202.
(4) 22 Q. B. D. 147.

Buckmaster, K.C., and *J. Tanner*, for the respondents. It is not necessary to consider the general question whether "water rate" is included in all covenants to pay "rates," but what is to be considered is, What is the meaning in this particular covenant of "all rates and taxes payable in respect of the demised premises"? When the lease was granted water rate was payable in respect of the whole of the building; a supply of water was a necessity for the lavatories.

[They were stopped.]

COZENS-HARDY M.R., after stating the nature of the appeal and the question for decision, continued:—It is important to consider the nature of the demised property. It was a portion of a very large building at the corner of Gray's Inn Road included in the original lease to Heywood & Co., Limited, who granted an underlease of the ground floor and the basement to Salmon & Gluckstein, Limited, and Salmon & Gluckstein, Limited, granted an underlease of a shop and part of the basement to the plaintiffs Messrs. Bourne & Tant. At the date of this underlease to the plaintiffs the whole block was supplied with water from the Water Board. It has not been, and could not be, suggested by anybody that in a building of that nature, containing, as is in evidence, lavatories and water-closets in that part of the premises which was demised to the plaintiffs, the supply of water in the manner in which it was supplied by the Water Board was a matter of option on the part of the tenants: it was clearly a matter of necessity; it was an inevitable condition of the demise, and was known by the parties to be so. There is also the further point that this is a property which is assessed for water as a whole. There is no separate assessment (although I agree there might be one), and there was at the date of the demise no separate assessment of this particular portion of this large building which was demised to the plaintiffs.

Under those circumstances, what is the meaning of the covenant in this underlease that the lessors will "procure to be paid all rates and taxes payable in respect of the demised premises"? It seems to me that the fair meaning of that covenant is that the rent which the lessees agree to pay for this

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portion of the property is to be an inclusive rent, and that they are not to be required to pay, but, on the contrary, are to be indemnified by their lessors against, all rates and taxes payable in respect of this portion of the block, including in that phrase the water rate, which is a rate the amount of which depends on the rateable value of the property, a rate which by common knowledge had to be paid.

I do not think it is necessary to express any concluded opinion as to what might be the effect of these words in a covenant contained in a lease, say, of a suburban house in which the tenant might or might not be able to get the water supplied for his necessities otherwise than from a water company. That is not the kind of case we are dealing with here. Thus far I have treated the matter as though it were devoid of authority; but nearly a quarter of a century ago, in 1884, the Divisional Court—consisting of Hawkins J. and A. L. Smith J.—gave the decision in *Direct Spanish Telegraph Co.* v. *Shepherd* (1), a case which, as it seems to me, it is impossible to distinguish from the one which is now before us. Mr. Macmorran has frankly and fairly asked us to overrule that decision and to say that it is no longer law. I am not prepared to do so. I think it is a very serious matter, in dealing with rates and questions of this kind, lightly to depart from an interpretation which must have governed and guided the rights of parties in innumerable cases of a similar kind ever since.

I, therefore, think that the view taken by Buckley J., though contrary to his own private opinion, was right, and that this appeal must be dismissed.

SIR GORELL BARNES, PRESIDENT. I agree, and I have really nothing to add, except that my agreement with the judgment which has just been delivered is on the basis that that judgment has been expressly confined to the case before us, viz: that of a lease containing these terms and applicable to premises the conditions with regard to which have been stated by the Master of the Rolls. It is conceivable that a different view might possibly be taken in other cases. I also desire to say that I think it is

(1) 13 Q. B. D. 202.

extremely important, where a decision has been in existence for some twenty or twenty-five years which is practically on all fours with the case before the Court, that the Court should be very reluctant to entertain a fresh view of that old decision which might disorganize the state of things which had existed as the result of that old decision for that length of time.

KENNEDY L.J. I also agree in the judgment of the Master of the Rolls.

Solicitors: *Bartlett & Gluckstein; Letts Brothers.*

W. C. D.

POSTMASTER-GENERAL *v.* NATIONAL TELEPHONE COMPANY, LIMITED.

[1906 P. 2573.]

Telegraph—Telephone—Postmaster - General—Monopoly—Exceptions—Private Lines—Telegraph Act, 1869 (32 & 33 *Vict. c.* 73), *s.* 5.

Private telegraph or telephone lines of the A to A class, such as lines from a merchant's office to his private house, or from a head to a branch office, fall within s. 5 of the Telegraph Act, 1869, and are therefore excepted from the Postmaster-General's monopoly, but private lines of the A to B class, viz., lines connecting two or more separate and independent persons or businesses, are not within the exception.

Attorney-General v. *Edison Telephone Co. of London, Ld.*, (1880) 6 Q. B. D. 244, 260-2, applied.

SPECIAL CASE.

This case raised the question whether certain classes of private telegraph and telephone lines were within the Postmaster-General's monopoly, or were excepted therefrom by s. 5 of the Telegraph Act, 1869.

The Telegraph Act, 1869, after a preamble reciting (inter alia) that, in order to protect the public revenue, it is expedient that similar powers to those conferred upon the Postmaster-General with respect to the exclusive privilege of conveying letters should be enacted with reference to the transmission of

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"public telegraphic messages" within the United Kingdom, enacts as follows:—

Sect. 4. "The Postmaster-General, by himself or by his deputies, and his and their respective servants and agents, shall . . . . have the exclusive privilege of transmitting telegrams within the United Kingdom . . . . except as hereinafter provided; and shall also within that kingdom have the exclusive privilege of performing all the incidental services of receiving, collecting, or delivering telegrams, except as hereinafter provided."

Sect. 5. "There shall be excepted from the said exclusive privileges of the Postmaster-General all telegrams of the following descriptions; (that is to say,)

"Telegrams in respect of the transmission of which no charge is made, transmitted by a telegraph maintained or used solely for private use, and relating to the business or private affairs of the owner thereof:

"Telegrams transmitted by a telegraph maintained for the private use of a corporation, company, or person, and in respect of which, or of the collection, receipt, and transmission or delivery of which no money or valuable consideration shall be or promised to be made or given: . . . ."

The defendants were the licensees of the Postmaster-General in respect of telephones, i.e., instruments for the purpose of transmitting or receiving spoken messages or communications by means of electricity, which are telegraphs within the Act: *Attorney-General* v. *Edison Telephone Co. of London, Ld.* (1)

The licence, dated November 29, 1884, was granted in consideration (clause 7) of a royalty on the defendants' gross receipts for the use of the telephones. Besides the usual exchange lines, the defendants also supplied and maintained private lines connecting two places direct and worked without the defendants' intervention by the parties at the terminals, one of whom paid an annual rental. They were of two classes, viz., A to A lines, with the terminals on property belonging to the same person, such as a line from a merchant's office to his private house or wharf or to his partner, or a line connecting a head and branch office, or any line connecting an employer and his servants.

(1) 6 Q. B. D. 244.

It was admitted that these were outside the Postmaster-General's monopoly.

The other class consisted of A to B lines, with the terminals on property belonging to different persons.

Eighteen examples, with details of these, were given in the first schedule to the special case, e.g., omitting names and dates.

3. From a doctor's residence to a chemist's shop, where the chemist not only makes appointments for patients to see the doctor, but also prepares drugs by the direction of the doctor and supplies them either to the doctor or direct to the doctor's patient. Agreement signed and rental paid by the doctor.

5. From theatrical ticket agents or dealers to sixteen hotels, thirty-two theatres, and two large stores. Agreement executed and rental paid by the ticket agents.

6. From the chief office of an estate company to a contractor (plumber or builder). Agreement executed and rental paid by the estate company.

8. From a company to a firm of solicitors. Agreement signed and rental paid by the company.

10. From a steamship company to excursion and tourist agents. Agreement signed and rental paid by the steamship company.

The Postmaster-General considered that A to B lines fell within his monopoly, so that royalties were payable thereon under the licence.

The defendants also supplied and maintained electric signals which, being non-telephonic, were not within the licence. Two examples of these were given in the second schedule, viz. :—

1. A fire-alarm system, consisting of special boxes placed in the street by a municipal corporation, and signalling apparatus supplied by the defendants and placed therein. No telephones are employed. Any member of the public, by breaking the glass front of and pulling a lever in the box, thus making an electrical contact, can cause a signal to be displayed at the police station, fire office or ambulance, and an electric bell or equivalent to operate. Agreements executed and rental paid by corporation.

2. From the premises of golf club to a tramway terminus. No telephone is used; a bell on the premises of the golf club is actuated by a push button fitted in a box attached to a tramway

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pole situated on the highway. The apparatus is operated by the tramway officials pressing the button, thus making an electrical contact and ringing the bell on the golf club premises so as to give signal of the starting of the trams. Agreement signed and rental paid by golf club.

The special case was submitted to determine, first, whether the defendants were accountable for royalties on the A to B lines as being within the Postmaster-General's monopoly; and, secondly, whether the unlicensed electric signals were a contravention of that monopoly.

Sir J. Lawson Walton, A.-G., Sir William Robson, S.-G., and *Casserley*, for the Postmaster-General. A to A lines are admittedly private lines and excepted from the monopoly, but A to B lines are not excepted. They are not maintained or used "solely for private use," and they do not relate to "the business or private affairs of the owner thereof." They relate to both business A and business B—independent businesses, in which there is no relation of principal and agent, or master and servant. For instance, in case 3 the doctor is the owner, but the telephone is used for the mutual benefit of the doctor's business and the chemist's business. In case 5 the telephones are used for the benefit of the hotels as well as the owners, the ticket agents. If the owners kept agents at the hotels the case would be different. The hotels are public places, and whether their visitors use the telephones themselves (which is not alleged) or employ a hotel servant to do so is immaterial. The ticket agents are really acting as an exchange. The same considerations apply to cases 6 and 10. The person with the preponderating interest pays the rental and becomes the owner, but the messages necessarily relate to both businesses. If the words "solely for private use" merely exclude user by the public, there might be a whole network of so-called private A to B lines, with a private exchange ad libitum. This would seriously injure the public revenue, which the Act was expressly passed to protect. The electric signals in schedule 2 are admittedly telegraphs; and the same considerations apply. The case is to a large extent covered by the judgment in *Attorney General* v. *Edison Telephone Co. of*

London, Ld. (1), which decides that signals are telegraphs (2); gives conclusive answers to the argument, based on the words "public telegraphic messages" in the preamble, that joint owners of a private line communicating directly with each other are outside the sphere of the Act altogether (3); and construes the word "owner" in the exceptions as "single owner," and not as "owners." (4)

Sir Robert Finlay, K.C., Eve, K.C., H. H. Gaine, and *Coutts Trotter*, for the National Telephone Company: There are three conditions of exemption, viz.: (1.) There must be no charge for transmission; (2.) the telegraph must be maintained or used "solely for private use"; (3.) the telegram must relate to the business or private affairs of the owner of the telegraph. Condition 1 is obviously complied with. In condition 2 the words "solely for private use" do not mean "solely for *the* private use" of the owner, but "solely for private as opposed to public use." This condition is fulfilled so long as the lines are not open to the public. This construction is aided by the preamble, which obviously intended to confine the monopoly to "public telegraphic messages," and, as the enacting words are ambiguous, the preamble may be used to construe them. Again, the Telegraph Act, 1869, is only an amendment Act. It amends the Telegraph Act, 1868 (31 & 32 Vict. c. 110), which incorporates the Telegraph Act, 1863 (26 & 27 Vict. c. 112). These Acts ought, therefore, to be read together for purposes of construction. Now the Telegraph Act, 1863, which regulates telegraph companies, provides (s. 41) that "Every telegraph of the company shall be open for the messages of all persons alike, without favour or preference; but this provision shall not prejudicially affect the operation of any lease or agreement authorized by this Act." Sect. 43 provides that the company shall not sell, transfer, or lease their undertaking or works, or any part thereof, to any other company or to any body or person, without the consent of the Board of Trade, but this provision "shall not restrict the making or carrying into effect by any company of any arrangement with any person for providing any work for his private use

(1) 6 Q. B. D. 244.
(2) Ibid. 249, 256.
(3) 6 Q. B. D. 259.
(4) Ibid. 262.

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only." The Telegraph Act, 1868, authorized the Postmaster-General to purchase and work the undertakings of telegraph companies. Sect. 9, which recites that railway companies are for the most part either themselves owners of telegraphs which are used for the conveyance of "public messages" and for traffic purposes, or have contracts with telegraph companies in that behalf, contains elaborate provisions for the regulation of these telegraphs. Sub-s. 7 speaks of the existence of "private telegraph wires"; and sub-s. 8 provides that the railway company may, notwithstanding anything in the Act contained, and without payment to the Postmaster-General, from time to time make arrangements with coalmasters, ironmasters, and traders generally upon the company's system for the erection and working of "private telegraphs" between coal pits, ironworks, factories, warehouses, and offices in connection with the stations of the company, or over their line; but such telegraphs shall be used "for the transaction of private business only," and no money payment shall be made or received in respect thereof, except by way of annual rent or payment for wayleave and other accommodation; and sub-s. 9 provides that, except as aforesaid, the railway company shall not transmit or permit the transmission of any telegraphic message through their wires. Now the words "solely for private use" in the Act of 1869 are merely a paraphrase of "for the transaction of private business only" in the Act of 1868, and it is clear that in the earlier Act "private" was merely opposed to "public." On the whole, therefore, condition 2 merely precludes user by the public. Condition 3 requires that the telegram must relate to the business or private affairs of the owner of the telegraph, but not that it shall relate to them exclusively. The test cannot be whether or not the line is for the sole advantage of the owner. If that were so, a line from a company to a solicitor employed at a salary would be within the exception, but a line to a solicitor charging ordinary costs would not be. The only point actually decided in *Attorney-General* v. *Edison Telephone Co. of London, Ld.* (1) was that a telephone exchange system was within the monopoly. That is not disputed. The present question was not decided. The electric

(1) 6 Q. B. D. 244.

bell signals in schedule 2 are no doubt telegraphs, but they are within the exceptions. The golf club bell is not open to the public at all. The fire-alarm bells can be worked by the public; but so can every front-door bell. The system merely places a number of front-door bells at various distances from the front door of the fire station. If these are within the monopoly, every front-door bell is within it.

The *Attorney-General* in reply.

Cur. adv. vult.

March 20. SWINFEN EADY J. It was not disputed by the defendants that all the telephonic lines mentioned in the first schedule to the special case are "telegraphs" within the meaning of the Telegraph Act, 1869, and the question whether the defendants are accountable to the plaintiff for royalties in respect thereof, under clause 7 of the licence of November 29, 1884, depends upon whether the communications transmitted thereby are, by virtue of s. 5 of the same Act, excepted from the exclusive privilege of the Postmaster-General. Two examples may be taken from the schedule as a sample of the rest. In case No. 5 a limited company carrying on business as theatrical ticket agents or dealers have a telephone line to sixteen hotels, thirty-two theatres, and two large stores. In case No. 10 a steamship company have a telephone line to a limited company carrying on the business of excursion and tourist agents. The telephones are used for ordinary business purposes, to the mutual advantage or benefit of the parties at each end of the lines of communication, but in the former case the line is owned or rented by the ticket agents, and in the latter by the steamship company. Are communications, made by telephone, under such circumstances, "Telegrams . . . . transmitted by a telegraph maintained or used solely for private use, and relating to the business or private affairs of the owner thereof"?

In my opinion the words "solely for private use" mean solely for the private use of the owner of the telegraph. In order to fall within this exception the communications must all relate to the business or private affairs of the same person, the owner of the line, including his family and employees—for instance, where different departments of the same works are connected by a line,

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or a head office and branches, or a proprietor's business house and private house, and the like; but where a telegraph is maintained for the mutual business or private affairs of two or more separate and independent persons or concerns it is not within the exception. The exception protects (by excluding from the Postmaster-General's exclusive privilege) the internal communications between different portions of the same establishment, whether for business or private affairs, but not the external communications between two or more separate establishments.

Indeed, if the argument of the defendants were well founded—that the words "private use" merely mean not open to user by the public—any number of persons might be connected together by a so-called private line, and apparently they could also be connected by a private telephone exchange, so long only as none of the telephones were open to user by the public. Such an interpretation of the Act of 1869 would practically destroy the monopoly of the Postmaster-General, which it was the intention of the Act to confer. The reasoning of Pollock B. and Stephen J. in *Attorney-General* v. *Edison Telephone Co. of London, Ld.* (1) is entirely opposed to such a view.

The second exception contained in s. 5 of the Act of 1869 relates to a similar telegraph, namely, one maintained for the private use of a corporation, company, or person. None of the telegraphs in the first schedule to the special case come within this description having regard to my decision as to the meaning of the words "solely for private use."

It follows from what I have said that I must answer the first question in the special case in the affirmative—that the defendants are accountable for royalties in respect of all the classes of lines referred to in the first schedule to the special case. It also follows that I must answer the second question in the affirmative, as the telegraphs in the second schedule are not maintained or used "solely for private use," and (not being fitted with telephones) are not within the licence.

Solicitors: *Sir Robert Hunter; W. E. L. Gaine.*

(1) 6 Q. B. D. 244, 260-2.

G. R. A.

In re JEMMETT AND GUEST'S CONTRACT.

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March 21.

[1907 J. 352.]

Settled Land—Life Tenant—Limited Owners with Powers of Life Tenant—Non-beneficial Owners—Trustees with Estate pur autre vie—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 58, *sub-s.* 1, *cl. v.*

Sect. 58 of the Settled Land Act, 1882, which gives the powers of a life tenant to the nine classes of limited owners therein described, only applies to beneficial owners, and therefore trustees with an estate pur autre vie cannot exercise a life tenant's powers under sub-s. 1, cl. v.

Vine v. *Raleigh*, [1896] 1 Ch. 37, not followed.

Vendor and Purchaser Summons.

By his will dated March 29, 1898, a testator, after making certain bequests, including a bequest to Jemmett and Forster (hereinafter called the general trustees) upon the trusts therein declared, devised certain freehold hereditaments to the use that his wife might receive thereout the annual rent-charge of 500*l.* during her life, and subject thereto to the use of the general trustees for the term of 500 years, commencing from the testator's death, upon the trusts thereinafter declared for raising a daughter's portion, and subject thereto to the use of the testator's first and other sons successively, according to seniority, in tail male, with remainder to the use of Jemmett, Forster and Medlycott (hereinafter called the Mervyn trustees) during the life of the testator's brother Mervyn upon the trusts thereinafter declared of the same, with remainder after Mervyn's death to the use of Mervyn's first and other sons successively, according to seniority, in tail male, with remainders over.

The testator declared that the said hereditaments were limited to the Mervyn trustees during Mervyn's life upon trust if they, in their absolute discretion, thought fit, but not otherwise, to permit Mervyn to reside at Ven, and, in the event of the limitation to the Mervyn trustees during Mervyn's life taking effect in possession, they should enter into possession or receipt of the rents and profits of all the settled hereditaments, and, subject to the

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aforesaid discretionary trust in favour of Mervyn, should continue in possession during Mervyn's life, with the very wide powers of management therein conferred, and generally might deal with the premises as they might do if they were the absolute beneficial owners thereof, without being answerable to Mervyn or any other person for any loss; and during Mervyn's life should out of the rents and profits pay the expenses incurred in management and in keeping and maintaining such an establishment as they might think fit to keep up at Ven for the convenience of Mervyn, and in the payment of all such rates, taxes and other outgoings, and wages, expenses and disbursements as to them might seem proper; and should apply any such sums in any year as they should think fit in or towards Mervyn's maintenance or benefit at Ven or elsewhere, and might pay any money to Mervyn or apply it personally; and should expend the balance of any rents, issues and profits not in any year expended in the purposes aforesaid in repairs or improvements of the settled hereditaments, and on Mervyn's death should pay over any moneys in their hands to the general trustees with a view to the expenditure thereof in repairs or improvements.

The testator declared that the general trustees for the time being should be the trustees of the settlement thereby made, and of every composite or compound settlement for the purposes of the Settled Land Acts.

And the testator declared that all the powers of the Settled Land Acts might be exercised by any life tenant entitled to exercise the same, or by any person having the powers of a life tenant, or by the general trustees, without obtaining the sanction of the Court, and with reference to any mansion-house as well as to the rest of the settled hereditaments, and by a sole trustee for the time being. And the testator appointed the general trustees executors of his will.

The testator died on February 17, 1902, without male issue.

On October 20, 1906, the Mervyn trustees contracted to sell the Toomer Farm estate, part of the settled hereditaments, to the purchaser, who paid a deposit. On examining the title the purchaser took the objection that the Mervyn trustees had no power of sale, and, as they were not beneficially entitled to

the estate pur autre vie during Mervyn's life, they were not persons having the powers of a life tenant under s. 58, sub-s. 1, cl. v.

The Mervyn trustees insisted that they had the powers of a life tenant, and that the general trustees could give a receipt for the purchase-money. The purchaser thereupon issued this summons for a declaration that her objection had not been sufficiently answered; that the Mervyn trustees were not persons entitled to exercise the powers of a life tenant; that a good title had not been shewn; and for return of the deposit, and costs.

Northcote, for the purchaser. Only persons beneficially entitled can exercise the powers of a life tenant under s. 58. Sect. 2, sub-s. 5, defines a life tenant as "the person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life." Then follow a number of sections conferring various powers of sale, leasing and so on, on the life tenant. Then s. 58 provides that nine classes of limited owners shall, when their estate or interest is in possession, have the powers of a life tenant under the Act as if each of them were a life tenant as defined in the Act. Most of the classes point clearly to beneficial ownership, but class v.—"A tenant for the life of another, not holding merely under a lease at a rent"—might, apart from the general tenor of the Act, include trustees. There are, however, many considerations which militate against such a view. In the first place, it might give rise to conflicting statutory powers. For instance, if there were a grant to trustees during the life of A. in trust to pay the rents to B., the trustees would have the powers of a life tenant under cl. v., and B. would have the same powers under cl. ix. Now s. 56 recognizes the fact that there may be a conflict between the powers of the settlement and the statutory powers, and provides that the statutory powers shall prevail. Similarly, settlements by way of trust for sale are provided for by s. 63 and by the Settled Land Act, 1884 (47 & 48 Vict. c. 18), s. 7. But there is no provision for the conflict of statutory powers, a contingency clearly not contemplated by the Act. Again, s. 50 prevents a life tenant divesting himself of his statutory powers. Suppose a trustee were held a quasi life tenant, and a new trustee

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were appointed and the estates transferred, who would be the proper person to exercise the powers? It is also difficult to see how a trustee with the powers of a life tenant could serve the statutory notices on himself under s. 45, or how s. 53, which makes the life tenant a trustee for all parties interested, would work in the case of a trustee with the powers of a life tenant. *Vine* v. *Raleigh* (1) is distinguishable. In that case a testator directed his personal estate to be invested in land to be settled, and subject to an annuity to his nephew he directed the rents to be accumulated during the nephew's life. After twenty-one years the trust for accumulation failed, and for the rest of the nephew's life the rents, being undisposed of, went to one of the testator's next of kin, and the executrixes of another next of kin. Chitty J. held that these persons had jointly the powers of a life tenant under cl. v. He seems to have considered that, as soon as the persons to whom the trustees were to pay the rents were ascertained, it was unnecessary to go further and inquire whether those persons held beneficially or otherwise.

[SWINFEN EADY J. Chitty J., referring to s. 2, sub-s. 5, and s. 58, sub-s. 1, cl. v., says: "In my opinion it is not necessary to say whether the case falls under one section or the other. It is plainly within s. 58, sub-s. 1, cl. v. It is quite possible there may be a question with regard to the executrixes under s. 2, sub-s. 5, whether they are beneficially entitled to possession. My present opinion is that for this purpose they are persons beneficially entitled, because they alone can receive the share of the deceased next of kin, and it would be going, I think, too far to say that the persons entitled under the will of the next of kin are the persons beneficially entitled to possession. But it is not necessary to decide this point." He apparently considered that s. 2, sub-s. 5, required a beneficial title, but that s. 58, sub-s. 1, cl. v., did not.]

The judgment is difficult to follow, especially as neither the next of kin nor the executrixes, being merely tenants pur autre vie, could possibly have been life tenants under s. 2, sub-s. 5. The decision should not be extended.

Johnston Edwards, for the vendors. The case is covered by

(1) [1896] 1 Ch. 37, 41.

Vine v. *Raleigh* (1), which is the only authority on the point. Even if a beneficial title were necessary the Mervyn trustees are expressly authorized to deal with the estate as if they were "the absolute beneficial owners thereof." Again, the testator provides that all the powers of the Settled Land Acts may be exercised by any life tenant, by any person having the powers of a life tenant, or by the general trustees, without obtaining the sanction of the Court, and with reference to any mansion-house as well as to the rest of the settled hereditaments. There is no difficulty in trustees giving statutory notices to themselves. This occurs whenever they exercise the powers of an infant under s. 60.

Northcote, in reply. The last clause only means that a life tenant and the general trustees can exercise their respective powers without the sanction of the Court. It cannot possibly mean that the general trustees can exercise a life tenant's powers, or vice versa.

SWINFEN EADY J. The question is whether the vendors can make a good title under the Settled Land Acts. The vendors are three trustees taking an estate pur autre vie during Mervyn's life, with full powers of management and wide discretion, which they may or may not exercise, as to allowing him to occupy Ven and as to the application of the income for his benefit. It is conceded that Mervyn is not a life tenant, but it is contended that the Mervyn trustees are tenants for the life of Mervyn within s. 58, sub-s. 1, cl. v., and therefore have the powers of a life tenant. The real question is whether the Mervyn trustees, not being beneficially entitled, are within cl. v. at all.

It is to be observed that the Settled Land Act, 1882, s. 2, sub-s. 5, defines a tenant for life as "the person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life." This definition is in "Part II., Definitions." Then follow a series of provisions conferring powers on a life tenant. Then s. 58 in Part XIII. deals with limited owners generally. The effect of s. 58 is really to extend the preceding provisions of the Act conferring powers on actual life tenants to these limited owners so long as their respective

(1) [1896] 1 Ch. 37, 41.

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estates or interests are in possession. In other words, the limited owners mentioned in s. 58, not being life tenants within the definition clause, are to have the powers of life tenants as if they were life tenants as previously defined.

Most, if not all, of the nine clauses of s. 58, sub-s. 1, obviously refer only to persons beneficially entitled, and in my opinion that section only applies to persons possessing beneficially the estates or interests therein mentioned. It really extends the powers of a tenant for life to persons with the specified beneficial interests, but who are not tenants for life within the definition clause. My view is strengthened by the consideration that if a non-beneficial title were enough, there might be conflicting statutory powers—e.g., if an estate were limited to trustees during the life of A. in trust to pay the rents to B., the trustees would have the powers of a life tenant under cl. v., and B. under cl. ix. This was not the intention of the Act.

The vendors have therefore not shewn a good title, and the purchaser is entitled to the relief asked by the summons.

Solicitors: *Bircham & Co.; Frere, Cholmeley & Co.*

G. R. A.

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[1904 L. 996.]

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March 12, 14, 27.

Settled Land—Life Tenant—Limited Owner with Powers of Life Tenant—Heir-at-Law—Trustees in Possession—Powers of Management—Subsisting Accumulation Trust for Discharge of Incumbrances—Void Trust for Purchase of Land—Accumulations Act, 1892 (55 & 56 *Vict. c.* 58), *s.* 1—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 2; *s.* 58, *sub-s.* 1, *cls. vi., ix.*

A testatrix devised her freehold hereditaments to the use of her trustees, giving them large powers of management, and directing them to pay certain annuities and other periodic sums out of rents and profits. During the successive lives of the plaintiff and two other persons, but not for more than twenty years after the testatrix's death, the trustees were to apply the surplus rents in the discharge of incumbrances on the estates thereinbefore devised, or in the purchase of other estates to be held on like trusts.

Subject to and after the determination or failure of the several directions thereinbefore contained, the trustees were to stand possessed of the hereditaments in trust for F.'s daughters successively according to seniority in tail male, with a like remainder to E.'s daughters. No such daughters were yet in esse.

After the determination or failure of the directions and trusts thereinbefore contained, the trustees were to settle the hereditaments to successive uses for lives and in tail male for ultimate remaindermen, but without any ultimate limitation of the fee. There were ultimate remaindermen for lives and in tail male in esse.

In *In re Baroness Llanover*, [1903] 2 Ch. 330, Farwell J. held that the direction to apply the surplus rents in the purchase of other estates must be deemed to be struck out by the Accumulations Act, 1892, and that the accumulation trust must be read as limited to the discharge of incumbrances.

On a subsequent motion to vary the minutes he formally declared that when and so soon as the accumulations should be sufficient to discharge the incumbrances the accumulation trust would become a trust for the purchase of land only and consequently void under the Accumulations Act, 1892, and that from that time, and so long as the surplus rents should by law remain undisposed of, they would belong, and be payable by the trustees as received, to the plaintiff as heiress-at-law. The accumulations were not yet sufficient to discharge the incumbrances:—

Held, on the construction of the will, that, subject to the accumulation trust for discharge of incumbrances, the surplus rents would be

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payable to a daughter of F. or E. as tenant in tail male, but that until the birth of such a daughter, and subject to any such daughter's interest, the surplus rents subject to the accumulation trust were payable by the trustees to the plaintiff as heiress-at-law during the lives of F. and E., after whose deaths, subject to any daughter's estate in tail male, the ultimate remainders would come into possession.

Held, also, that, having regard to the nature and extent of her interest as heiress-at-law, the plaintiff had not at the present time the powers of a life tenant either under cl. vi. or under cl. ix. of s. 58, sub-s. 1, of the Settled Land Act, 1882.

In re Jones, (1884) 26 Ch. D. 736, 742, followed as to cl. vi. and distinguished as to cl. ix.

In re Clitheroe Estate, (1885) 31 Ch. D. 135; *In re Richardson*, [1900] 2 Ch. 778; and *In re Money Kyrle's Settlement*, [1900] 2 Ch. 839, distinguished.

Semble, cl. vi. does not apply to a person merely entitled to receive surplus rents from trustees who are in possession and managing the estates, and cl. ix. does not apply (*a*) to a terminable life interest, or (*b*) to any interest taken under an intestacy, though comprised in the subject of the settlement under s. 2, sub-s. 2.

Held, also, that a mortgage by the trustees for the purpose of raising estate duty was an incumbrance within the accumulation trust.

ORIGINATING SUMMONS.

By her will dated August 16, 1889, a testatrix, after appointing executors and trustees, provided (inter alia) as follows:—

"3. I give and bequeath all the freehold copyhold and leasehold hereditaments devised by my said husband to me, and also my freehold house . . . . in Great Stanhope Street . . . . and my Ynysyngharad property . . . . and all other (if any) the freehold copyhold and leasehold hereditaments to which I may be entitled at my death or over which I may then have a general power of testamentary disposition . . . . unto and to the use of my trustees . . . . (subject as regards the hereditaments so devised to me as aforesaid to the several charges and incumbrances hereinbefore mentioned) upon trust to enter into possession or receipt of the rents and profits of or to manage . . . . the same respectively with power to cut non-ornamental timber . . . . and to repair and . . . . erect farm-houses and cottages and to drain . . . . the said hereditaments and to insure houses . . . . and to make allowances to and arrangements with tenants and others and to accept surrenders of leases and tenancies and to let the said hereditaments . . . . (except the two

mansion-houses . . . . at Llanover and the house . . . . called Abercarn Uchaf and the mansion . . . . in Great Stanhope Street) . . . . and with full power to sell or exchange . . . . the said hereditaments (except as aforesaid) . . . . and I declare that the moneys to arise from the sale . . . . shall be applied in the manner by the 10th paragraph of this my will directed concerning the proceeds of my residuary property.

"4. I direct that my trustees . . . . shall by and out of the rents and profits of the said hereditaments . . . . pay and discharge the expenses incurred in or about such management . . . . and any annual sum or sums of money which may for the time being be charged upon the same hereditaments . . . . (including the annuities (if any) given by any codicil hereto) and the interest of any principal sum or sums of money which may be charged upon the said premises . . . . and subject thereto shall pay" certain annuities, including life annuities to her daughter Augusta (the plaintiff), her granddaughter Henrietta, and her grandson Ivor, and certain premiums on life policies to be effected by the trustees.

"5. I direct that subject as aforesaid my trustees . . . . shall apply such annual sum or sums of money as shall be necessary for keeping up the two mansion-houses . . . . at Llanover and also the residence . . . . called Abercarn Uchaf and the mansion . . . . in Great Stanhope Street in a fit state for residence . . . . (including in such keeping up the wages of all servants and other persons employed by my trustees . . . .) and my trustees . . . . shall permit my daughter Augusta . . . . during her life to reside at the said mansion-houses . . . . at Llanover, the residence . . . . called Abercarn Uchaf and the mansion . . . . in Great Stanhope Street and during any and every such residence at the mansion-houses . . . . at Llanover or at the mansion-house in Great Stanhope Street . . . . my trustees . . . . shall out of the said rents and profits (subject to the prior payments thereout hereinbefore directed) pay to my said daughter an allowance of 80*l.* per week during such residence . . . . and subject as aforesaid my trustees . . . . shall during the life of my said daughter but not for a period of more than twenty years after my death apply the ultimate surplus

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if any of the said rents and profits in the manner by the 10th paragraph of this my will directed concerning the proceeds of my residuary property. And after the death of my said daughter, if my said granddaughter Henrietta . . . . shall be then living and shall not then have married, my trustees . . . . shall permit my same granddaughter until she shall marry to reside at my said house . . . . called Abercarn Uchaf and during any and every such residence . . . . my trustees . . . . shall out of the said rents and profits, subject to the prior payments thereout hereinbefore directed, pay to my said granddaughter an allowance of 10*l.* per week, and subject thereto, if my said grandson Ivor . . . . shall be living my trustees . . . . shall permit my same grandson so long as he shall be the husband of his present wife or her widower (without having married again) or the husband of any Protestant Trinitarian Christian whom he may marry after her death to reside at my said mansion-houses . . . . with such allowance during his residence . . . . as I have hereinbefore directed in the case of my said daughter and apply the surplus (if any) of the rents and profits of the premises, after all other payments thereout, but not for more than twenty years after my death in the manner by the 10th paragraph of this my will directed concerning the proceeds of my residuary property. And subject to and after the determination or failure of the several directions hereinbefore contained my trustees . . . . shall permit my great-granddaughter Fflorens . . . . to reside at my said mansion-houses . . . . with such allowance during her residence . . . . as I have hereinbefore directed in the case of my said daughter, and apply the surplus (if any) of the rents and profits of the premises, after all other payments thereout, but not for more than twenty years after my death in the manner by the 10th paragraph of this my will directed concerning the proceeds of my residuary property . . . . and subject to and after the determination or failure of the several directions hereinbefore contained my trustees . . . . shall stand possessed of the said freehold premises (subject to the annuities charges and incumbrances for the time being affecting the same under this my will or any codicil hereto) and all surplus rents thereof In trust . . . . for every daughter of the said

Fflorens . . . . by a Protestant Trinitarian Christian husband successively according to seniority in tail male and in default or on failure of such issue for every daughter of my great-grandson Elydr . . . . by a Protestant Trinitarian Christian wife successively according to seniority in tail male. . . . ."

No daughters of Fflorens or Elydr were yet in existence.

" 6. I direct that after the determination or failure of the directions and trusts hereinbefore contained and declared my trustees . . . . shall continue such of the annuities hereinbefore bequeathed as may not have ceased on the same terms . . . . as hereinbefore mentioned and subject as aforesaid shall settle the said freehold premises subject to the charges and incumbrances for the time being affecting the same under this my will or any codicil hereto" to successive uses for lives and in tail male for ultimate remaindermen, but without any ultimate limitation of the fee to the testatrix's heirs or otherwise. The copyholds and leaseholds were to be settled on corresponding trusts. There were life tenants and tenants in tail male in esse prospectively entitled under this trust.

" 10. I give the residue of my property not disposed of by any codicil hereto to my trustees in trust to realize the same and apply the proceeds in the discharge of incumbrances on the estates hereinbefore devised, or in the purchase of other estates near the devised Llanover estate and to be held on like trusts and subject to like powers and directions as the said last mentioned estate."

The right of the testatrix's granddaughter Henrietta to reside at Abercarn Uchaf with an allowance of 10*l.* a week was revoked by a codicil which gave her other benefits.

The testatrix died on January 17, 1896.

The mortgages and charges on the estates were consolidated by the trustees into one mortgage of 100,000*l.* in favour of Oxford University. This included a sum of 40,000*l.* for estate duty payable on the testatrix's death. The trustees had raised this sum by mortgage under the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 9, sub-s. 5.

On March 20, 1903, the Court of Appeal declared that the

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plaintiff was life tenant of the mansion-houses: vide *In re Baroness Llanover's Will.* (1)

On May 27, 1903, Farwell J. held that the trust for accumulation, so far as it directed purchase of land, was void: vide *In re Baroness Llanover.* (2)

On August 10, 1903, on a motion to vary the minutes, Farwell J. made the following order:—

"This Court doth declare, that the will and codicils of the testatrix executed before the passing of the Accumulations Act, 1892, but coming into operation upon the death of the testatrix after the passing of the Act, constitute a disposition within the meaning of the Act.

"And the Court doth declare, that when and so soon as the defendants the trustees of the will had or will have in their hands or under their control moneys or funds sufficient and available for the discharge of the principal sum of 100,000*l.*, now secured under the mortgage to the University of Oxford, the trust in the 10th paragraph of the will contained so far as it is by the 5th paragraph of the will directed to apply to the surplus rents and profits in the said 5th paragraph mentioned, became or (as the case may be) will become a trust for the purchase of land only within the meaning of the said Act and consequently void, and that from that time, and so long as the same surplus rents and profits shall by law remain undisposed of, the same will belong and be payable by the defendants the trustees as received to the plaintiff as heiress-at-law and next-of-kin of the testatrix and the persons or person deriving title under her. . . . ."

On May 5, 1904, the plaintiff issued this summons for (inter alia) a declaration that she had the powers of a life tenant over all the estates.

She claimed these powers even if the trust for accumulation was still subsisting, but also contended that it had in fact come to an end.

The accumulations were, roughly, about 70,000*l.*, and the plaintiff alleged that the trustees had irrevocably appropriated a sum of 44,000*l.*, the proceeds of sale of Coldbrook, to the

(1) [1903] 2 Ch. 16. (2) [1903] 2 Ch. 330.

discharge of the Oxford mortgage, so that the fund available was over the requisite 110,000*l.* suggested by Farwell J.

This point failed on the evidence.

The plaintiff also contended that the 40,000*l.* raised for estate duty ought not to be treated as an incumbrance within the accumulation clause, so that it was only necessary to accumulate 66,000*l.* to meet 60,000*l.* of the Oxford mortgage instead of 110,000*l.* to meet the 100,000*l.*, and the accumulations in hand already exceeded the smaller amount.

The case had been considerably delayed owing to the taking of necessary accounts and inquiries, which were not yet completed.

Warmington, K.C., Eve, K.C., and *Henry Fellows*, for the plaintiff. Sect. 58, sub-s. 1, of the Settled Land Act, 1882, gives the powers of a life tenant to certain limited owners "when the estate or interest of each of them is in possession," including (inter alia)—

Clause vi., "A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose:"

Clause ix., "A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event."

The plaintiff's estate or interest as heiress-at-law falls within both these clauses, though more obviously within cl. vi. In the first place, that estate or interest is an estate or interest coming to the plaintiff "under or by virtue of the settlement, and comprised in the subject of the settlement": Settled Land Act, 1882, s. 2, sub-s. 2; *In re Hunter and Hewlett's Contract.* (1) Secondly, her estate or interest is in possession, and for this

(1) Ante, p. 46.

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reason. The trust for accumulation is twofold—viz., a valid trust for discharge of incumbrances, a void trust for investment in lands. The valid trust, though it may for the present exhaust the income, is really only a charge which does not affect the plaintiff's status as limited owner in possession: *In re Jones* (1); *In re Clitheroe Estate* (2); *Williams* v. *Jenkins* (3); *In re Richardson* (4); *In re Money Kyrle's Settlement* (5); *In re Martyn* (6); Wolstenholme's Conveyancing and Settled Land Acts, 9th ed. pp. 420, 421; Hood and Challis' Conveyancing and Settled Land Acts, 6th ed. pp. 303, 304. What, then, is the nature of the plaintiff's estate or interest subject to this charge? In the first place, there is a trust during the plaintiff's life, but not for more than twenty years from the testatrix's death, to accumulate for the purchase of land only. That is not a mere charge. It is a complete disposition of the residuary real estate for that period. This disposition is rendered void by the Accumulations Act, 1892, with the result that there is a statutory intestacy for the same period, as the statute does not accelerate the remainders. The estate, therefore, descends to the plaintiff during that period, viz., for her own life not exceeding the twenty years. This is a life estate ceasing at the end of the twenty years, and is within cl. vi. That is the estate or interest now in possession, and it is unnecessary to pursue the subsequent limitations.

[SWINFEN-EADY J. What will happen after the plaintiff's death or after the twenty years?]

Subject to her own terminable life estate, the plaintiff takes a reversionary estate pur autre vie during Ivor's life, but not exceeding the twenty years, and then a similar reversionary estate pur autre vie during Fflorens' life, not exceeding the twenty years. That finishes the estates taken under the statutory intestacy. The estate will then go to a daughter of Fflorens or Elydr in tail male, but in default or on failure of any such estate in tail male there may be a further ordinary intestacy during their lives. In other words, after the period of statutory intestacy, the plaintiff will take the estate during the lives of Fflorens and

(1) 26 Ch. D. 736, 742.
(2) 31 Ch. D. 135.
(3) [1893] 1 Ch. 700.
(4) [1900] 2 Ch. 778.
(5) [1900] 2 Ch. 839.
(6) (1900) 69 L. J. (Ch.) 733.

Elydr, subject to letting in or being displaced by any estate in tail male in a daughter. On the death of Fflorens and Elydr and the failure of the estates in tail male, the plaintiff will take the ultimate fee simple subject to the life estates and estates in tail male to be limited under clause 6 of the will.

These subsequent estates do not of course interfere with the plaintiff's present terminable life estate. She is merely a limited owner within cl. vi. or cl. ix. and something more: *In re Marshall's Settlement.* (1) Even if the valid trust for accumulation for discharge of incumbrances could not have been treated as a charge at the testatrix's death, it has at all events now come to an end, as the incumbrances referred to in clause 10 of the will cannot include the 40,000*l.* borrowed by the trustees for estate duty, and the present accumulations are sufficient to provide for the balance of the Oxford mortgage.

Upjohn, K.C., and *Howard Wright*, for the present trustees, two of whom were Ivor and Elydr. The effect of the Accumulations Act, 1892, is to cancel the void accumulation trust in toto, not to treat it as a void disposition and cause an intestacy. In other words, the will must be read as if the latter part of clause 10 directing accumulation for the purchase of land had never been inserted: *In re Baroness Llanover.* (2) There is, then, merely a valid trust for the discharge of incumbrances during the periods mentioned, and subject to that trust the estate goes to the daughter of Fflorens or Elydr in tail male. The result would be the same in this particular case even if the void trust were not struck out, as the estate is devised to the daughters in tail male "subject to and after the determination or failure of the several directions hereinbefore contained," so that the void trust for accumulation would sink for their benefit: *In re Clulow's Trust.* (3) The so-called statutory intestacy and the estates taken thereunder have therefore no existence. No doubt when the valid accumulation trust has come to an end the plaintiff will be entitled to the surplus rents so long as they are undisposed of, as was in fact declared by the order of August 10, 1903. But this is not an interest in possession, as distinguished

(1) [1905] 2 Ch. 325. (2) [1903] 2 Ch. 330.
(3) (1859) 1 J. & H. 639.

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from an interest in reversion, which is what the Settled Land Act means: *In re Morgan* (1); *In re Jones* (2); *In re Strangways.* (3) It is an interest in reversion on the valid trust for discharge of incumbrances, and, unless the plaintiff can bring herself within cl. vi., that trust cannot be treated as a mere charge.

Now the plaintiff is not a tenant for her own or any other life, whose estate is liable to cease in any event during that life, or is subject to a trust for accumulation for payment of debts. Her right to be paid the surplus rents by the trustees, who are in possession with full powers of management, does not really give her an estate within cl. vi.: *In re Jones.* (2) Assuming, however, that she takes an estate, she is heiress of the fee simple in reversion on the valid trust for accumulation, subject to letting in the estates in tail male in the daughters of Fflorens and Elydr, and after their deaths and the failure of their estates in tail male, subject to letting in the life estates and estates in tail male to be settled under the executory trusts of clause 6 of the will. Of course, the latter are not yet strictly estates at all, but this point is academic. The plaintiff is heiress in reversion to all this undisposed of interest as one interest. She cannot break it up into a number of limited life interests with an ultimate reversion in fee so as to bring herself within cl. vi. and treat the accumulation trust merely as a charge. Her estate is not a terminable life estate or estate pur autre vie at all. It is the absolute fee simple out of which certain life estates and estates in tail male are carved. Clause vi. is therefore inapplicable, and the plaintiff can neither be treated as a limited life tenant, nor can the trust for accumulation be treated as a charge so as to bring her estate into possession. Clause ix. is also inapplicable, as there is no trust or direction for payment to the plaintiff during her own or any other life. The 40,000*l.* raised for estate duty was clearly an incumbrance within clause 10 of the will, as the testatrix obviously intended the corpus to devolve free of incumbrances. The valid accumulation trust is therefore still subsisting.

(1) (1883) 24 Ch. D. 114. (2) 26 Ch. D. 736, 742.
(3) (1886) 34 Ch. D. 423.

Micklem, K.C., and *Gregson*, for Fflorens, and *Hon. E. C. Macnaghten, K.C.*, and *Bryan Farrer*, for the ultimate remaindermen, adopted the same arguments.

Warmington, K.C., in reply. The Accumulations Act, 1892, is entitled "An act to amend the law respecting accumulations." That law is contained in the Thellusson Act, i.e., the Accumulations Act, 1800 (39 & 40 Geo. 3, c. 98). That Act allowed four well-known periods for accumulation. The 1892 Act merely restricts accumulation for the purchase of land to the fourth period, viz., the minorities of persons who, if of full age, would be entitled to the rents. The period of twenty-one years from the testator's death is no longer allowed. The consequences of an excessive accumulation clause must be sought for in the earlier Act, and it is well settled that where excessive accumulations of residue are directed there is an intestacy: *Vine* v. *Raleigh*. (1) The judgment of Farwell J. in *In re Baroness Llanover* (2) cannot mean that the void accumulation clause is to be struck out of the will for purposes of construction. Of course it cannot be carried out. That is why there is an intestacy. The order of August 10, 1903, does not direct the void clause to be treated as struck out. On the contrary, it says that when the accumulations are sufficient to discharge the Oxford mortgage the entire clause "will become a trust for the purchase of land only" and consequently void, and that from that time, and so long as the surplus rents and profits shall "by law" remain undisposed of, they will belong to the plaintiff as heiress-at-law. That would have been rather a curious way of declaring that there would be no statutory intestacy during the void period, but that there would merely be an ordinary intestacy till the birth of a tenant in tail male. The question how long the surplus rents and profits would "by law" remain undisposed of was not really dealt with. If, however, the Accumulations Act, 1892, is to be construed in a different way to the Thellusson Act so that there is no statutory intestacy, and there is merely a valid trust for discharge of incumbrances and then a gift in tail male to the daughter of Fflorens or Elydr, then the plaintiff is entitled during the lives of Fflorens and Elydr until that

(1) [1896] 1 Ch. 37. (2) [1903] 2 Ch. 330.

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daughter is born. This is a terminable estate pur autre vie within cl. vi., and the fact that the plaintiff may take subsequent estates on failure of subsequent limitations is immaterial.

A devise to John for life, if and when Mary marries, with remainder to James, an attesting witness, in fee gives the estate to the heir during Mary's spinsterhood, with remainder to John for life, with remainder to the heir in fee. Surely the heir would be within cl. vi. in spite of his remainder in fee: *In re Marshall's Settlement.* (1) If the plaintiff has not strictly any "estate" within cl. vi. she is entitled under cl. ix. under a resulting trust to pay the surplus rents to her until forfeiture of her interest therein at the end of the statutory intestacy, or on the birth of a tenant in tail male, whichever shall last happen.

Cur. adv. vult.

March 27. SWINFEN EADY J. The plaintiff asks, in the first place, to have it determined that she has the powers of a life tenant, within the meaning of the Settled Land Acts, over the testatrix's residuary real estate, including the real estate formerly belonging to the testatrix's husband.

The interest in respect of which the plaintiff claims is not devised to her by the will, but in the events which have happened is undisposed of, and is taken by the plaintiff as heiress-at-law; but it is contended on her behalf that, having regard to s. 2, sub-s. 2, of the Settled Land Act, 1882, it is an estate or interest coming to her under or by virtue of, and is comprised in, the settlement made by the will.

The will contains a trust for the accumulation of surplus rents and profits for the discharge of incumbrances on the estates, and the plaintiff's interest is subject to this trust. There is a dispute as to what incumbrances are included in the direction, and whether the sum already accumulated is sufficient to satisfy the direction, and as to whether the trustees have appropriated certain capital moneys representing proceeds of sale in or towards the incumbrances, and as to whether the plaintiff, if a person having the powers of a life tenant, can require the trustees to

(1) [1905] 2 Ch. 325.

apply certain moneys under their control in discharge of incumbrances and thus prevent the further accumulation of rents and profits.

The will also contains a direction to accumulate surplus rents and profits for the purchase of other lands, but, having regard to the decision of Farwell J. upon this will in *In re Baroness Llanover* (1), the will must be read as if this direction were not contained in it.

I will first consider the construction of the will, in order to ascertain and determine the interest which is undisposed of and devolves upon the plaintiff as heiress-at-law. The testatrix has directed various payments, involving considerable sums, and which may be payable for a long period, to be paid out of rents and profits, and has then proceeded to deal with the surplus of the rents and profits. This surplus is to be accumulated for the discharge of incumbrances during the life of the plaintiff, and afterwards during the life of the testatrix's grandson Ivor, and afterwards during the life of her great-granddaughter Fflorens, but not in any case for more than twenty years after the death of the testatrix; "and subject to and after the determination or failure of the several directions hereinbefore contained," the trustees are to stand possessed of the freehold premises and all surplus rents thereof in trust for every daughter of Fflorens successively according to seniority in tail male, and in default or on failure of such issue for every daughter of the testatrix's great-grandson Elydr successively according to seniority in tail male. The testatrix then directed (by clause 6 of her will) that after the determination or failure of the directions and trusts hereinbefore contained and declared the freehold premises should go to certain life tenants, with divers remainders in tail male. There are both life tenants and tenants in tail male entitled under these limitations in esse, and they are defendants to this summons. But their estates do not fall into possession until after default or failure of issue of Fflorens and Elydr respectively, and these are quite young people. The will does not contain any disposition of the ultimate remainder in fee.

It was urged on behalf of the plaintiff that she was now tenant

(1) [1903] 2 Ch. 330.

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for her own life (but not for a period of more than twenty years from the death of the testatrix) of the surplus rents and profits, and, therefore, of the residuary estate, and that under s. 58, sub-s. 1, cl. vi., of the Settled Land Act, 1882, she has the powers of a life tenant, and that the trust for the accumulation of income makes no difference.

In my opinion, according to the true construction of the will, the interest which devolves upon the plaintiff by reason of being undisposed of is not measured in any way by her own life. For the purpose of considering her interest the duration of her own life is an immaterial factor. Her interest may cease during her life, or may continue long after her life. It is only the trust for accumulation that is limited by reference to her life, and after her decease by reference to the lives of Ivor and Fflorens. It may continue during her life, and their lives, not exceeding twenty years from the death of the testatrix. The accumulation is only, however, for a particular purpose—the discharge of incumbrances. Upon the purpose being satisfied the trust comes to an end. Subject to this trust the surplus rents purport to be disposed of by the will, namely, to a daughter of Fflorens or Elydr, who will take the estate as tenant in tail male. But there is no such person yet in existence.

Under these circumstances the plaintiff is entitled (subject to the trust for accumulation) to the surplus rents during the respective lives of Fflorens and Elydr, but this interest for lives is liable to be determined by the birth of a daughter to either Fflorens or Elydr, who on birth will be tenant in tail male. The interest for lives would arise again on any subsequent failure of the issue in tail during the parent's lifetime. Upon the death of Fflorens and Elydr respectively without any such daughter having been born, or, if born, on the failure of the entail, the estates in remainder, given by clause 6 of the will, or such of them as may then be subsisting, will come into possession.

Is the plaintiff a tenant for her own or any other life within the meaning of s. 58, sub-s. 1, cl. vi., of the Settled Land Act, 1882? The land is not devised to her for her own or any other life.

In each of the cases relied upon by the plaintiff—*In re Clitheroe Estate* (1), *In re Richardson* (2), and *In re Money Kyrle's Settlement* (3)—there was a person to whom the property had been conveyed or devised for his life, and the difficulty which rendered necessary an application to the Court was the existence of charges and of a long term of years having priority over the life estate. The decision of the Court of Appeal in *In re Clitheroe Estate* (1) was under cl. vi., although the head-note of the report refers to cl. ix. by a slip.

But in the present case the plaintiff is only entitled, as appears from the order of Farwell J. of August 10, 1903, to the surplus rents and profits which by law remain undisposed of, and which are payable by the trustees, as received, to the plaintiff. This distinguishes the present case from those to which I have just referred. Whether this interest in the surplus rents brings the plaintiff within cl. ix. is another point to be considered, but she does not, in my opinion, fall within cl. vi. This point is really covered by the decision in *In re Jones* (4), which was a decision under cl. ix. The Court of Appeal held that the direction in the will to pay the ultimate residue of the rents and profits to Colonel Grey during his life brought him within cl. ix., but Cotton L.J. pointed out that a person entitled to income is not in the ordinary position of an equitable tenant for life, saying: "I think that s. 58 (1.) (ix.) was introduced to meet the very case which exists here of trustees who are not simply trustees in whom the legal estate is vested (in which case the equitable tenant for life would be entitled to possession or to receipt of the rents from the tenants), but have powers of management which necessitate their remaining in possession, that is to say, managing the estates and receiving the rents from the tenants. The person entitled to income is not in the ordinary position of an equitable tenant for life, but is entitled to receive from the trustees who are in possession and are managing the estate, that which is called in the Act the 'income' of the land. . . . . In my opinion we must hold that, as the limitations of the settlement put Colonel Grey in the position of having an immediate right to receive the income

(1) 31 Ch. D. 135.
(2) [1900] 2 Ch. 778.
(3) [1900] 2 Ch. 839.
(4) 26 Ch. D. 736, 742, 743.

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of the land, if there is any, from the trustees, he comes within s. 58 (1.) (ix.)."

The question next arises, Is the plaintiff within cl. ix. as a person entitled to the income of land during her own or any other life? In this clause there is not any repetition of the words which occur in cl. vi.: " . . . . whose estate is liable to cease in any event during that life . . . . or to be defeated by an executory limitation . . . . over." The plaintiff may be " a person entitled to the income of land," as the surplus income, if any, would be payable to her, but she is not entitled " during her own or any other life," as her interest is liable to determine at any moment on the birth of a daughter to Fflorens or Elydr. Nor is the surplus income payable to her " under a trust or direction for payment thereof to her " as was the case in *In re Jones.* (1) Her interest really arises because the will does not contain any " trust or direction for payment thereof." And, although s. 2, sub-s. 2, provides that an estate or interest in remainder or reversion not disposed of by a settlement and descending to the testator's heir is for purposes of the Act an estate or interest coming to the settlor under or by virtue of the settlement and comprised in the subject of the settlement, there is no provision in the Act that an heir taking on an intestacy the undisposed-of surplus of rents and profits shall be deemed to take " under a trust or direction for payment thereof to him " which the will does not really contain. For these reasons the plaintiff does not in my judgment fall within cl. ix.

The result is that the plaintiff has not at the present time the powers of a life tenant under the Settled Land Acts. [After dealing with certain other points, his Lordship continued:—] Another point raised was that in order to provide for estate duties the trustees have borrowed the money on mortgage. The regularity and propriety of this act is not challenged, but it is urged that such incumbrance is not within the trust contained in clause 10 of the will. I am unable to appreciate why it is not within the clause. The object of the testatrix in directing an accumulation of rents and profits to discharge incumbrances was in order that the lands might subsequently devolve as

(1) 26 Ch. D 736, 742, 743.

unincumbered, and a mortgage to secure moneys borrowed to pay estate duties is as much an incumbrance as a mortgage created for any other purpose. In my judgment this mortgage is an incumbrance within clause 10. I may add with reference to this mortgage that no question arises under the Thellusson Act.

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Solicitors: *Hunter & Haynes; Freshfields; Farrer & Co.; Boodle, Hatfield & Co.*

G. R. A.

In re JUDE'S MUSICAL COMPOSITIONS.

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Copyright — Registration — Musical Composition — Agreement — Author and Publisher—Assignment—Entry on Register—Application to Expunge—Practice—Appeal—Copyright Act, 1842 (5 & 6 *Vict. c.* 45), *ss.* 2, 13, 14.

In July, 1900, J., who was the author of, and registered proprietor of the copyright in, certain musical compositions published in a series under the title of "Music and the Higher Life," entered into an agreement with N., the managing director of a publishing company, whereby, in consideration of J. giving to N. the sole and exclusive right of printing and publishing the series of "Music and the Higher Life," and issuing the same in volume form, N. and J. jointly agreed that—(1.) the cost of printing and issuing the volume should be borne by N.; (2.) N. should pay to J. 6*d.* on every copy sold; (3.) N. should supply J. with such copies as he might require at 1*s.* 6*d.* per copy, any copies supplied to J. not to be liable to the royalty of 6*d.* N. subsequently assigned his rights under the agreement to the publishing company. That company afterwards published two other series of musical compositions by J., entitled respectively "The Liedertafel Series" and "The Preacher-Musician Series," and also a work entitled "Music and the Higher Life (abridged edition)," which contained thirty-six numbers from the original series, seven numbers from "The Liedertafel Series," and two numbers from "The Preacher-Musician Series."

In 1903 the publishing company registered themselves as proprietors of the copyright in "Music and the Higher Life (abridged edition)," and also of the copyright in "The Liedertafel Series" and "The Preacher-Musician Series," claiming to be entitled to do so on the ground that the copyright in the compositions forming the series "Music and the Higher Life" had been assigned to N. by the agreement in July, 1900, and that it had been agreed in writing by J. that the terms contained in that agreement should also apply to the "Liedertafel" and "Preacher-Musician" series. They also alleged that all the three registrations had been made with the oral consent of J.

On an application by J. under the Copyright Act, 1842, s. 14, to expunge these three entries from the register on the ground that he had

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not parted with the copyright, Kekewich J. ordered that they should be expunged :—

Held, that an appeal lay to the Court of Appeal from his decision, but

Held (affirming that decision), that the agreement of July, 1900, only passed the sole and exclusive right of printing and publishing the series called "Music and the Higher Life" in a particular form, namely, volume form, and did not amount to an assignment of the copyright in the compositions forming that series; and that, there having been no assignment of the copyright in the above-mentioned works in writing by J. before the registration by the publishing company, that registration could not be regarded as an entry of an assignment of the copyright within s. 13 of the Copyright Act, 1842, and consequently that the publishing company were not entitled to be registered as proprietors of the copyright.

APPEAL from an order made by Kekewich J. (1) as after mentioned upon an application under the Copyright Act, 1842, s. 14, to expunge from the Registry Book of the Stationers' Company three entries whereby Reid Brothers, Limited, were registered as the proprietors of the copyright in three musical compositions entitled respectively: "The Liedertafel Series of Carols, descriptive choral hymns, male voice glees, &c., edited by W. H. Jude"; "The Preacher-Musician Series of Revival Songs, edited and arranged by W. H. Jude"; and "Music and the Higher Life (abridged edition), with other solos, by W. H. Jude."

An action having been brought by W. H. Jude, the applicant (the respondent in the appeal), against Reid Brothers, Limited (the appellants), to establish his title to the copyright, the hearing of the application was by consent treated as if it were the trial of the action.

W. H. Jude was a musical composer and evangelistic preacher. The appellants, Reid Brothers, Limited, were the printers and publishers of his compositions, William Cartwright Newsam being the managing director of the company. Their predecessors, Messrs. Reid Brothers, had also printed and published for Mr. Jude, he paying the cost of the composing and plates, and having a share in the profits. In 1894 Mr. Jude wrote a series of sacred songs and services entitled "Music and the Higher Life," and published them in single numbers.

(1) [1906] 2 Ch. 595.

On April 2, 1897, he registered himself as proprietor of the copyright of "Music and the Higher Life," giving "Reid Brothers" as the name of the publishers. They shortly afterwards were formed into a limited company. On March 19, 1899, Mr. Jude appointed Reid Brothers, Limited, sole agents for the sale of the series "Music and the Higher Life" in consideration of their using their best endeavours to influence the sale of the series. On July 27, 1900, Mr. Jude and Mr. Newsam entered into an agreement in writing, which was headed "'Music and the Higher Life' series and volume," and the terms of which were as follows:—

"In consideration of Mr. W. H. Jude giving Mr. W. C. Newsam the sole and exclusive right of printing and publishing the series of 'Music and the Higher Life,' and issuing the same in volume form, Mr. W. C. Newsam and Mr. W. H. Jude jointly agree to the following conditions:—

"(1.) The cost of printing and issuing the volume to be borne by Mr. W. C. Newsam.

"(2.) Mr. W. C. Newsam to pay Mr. W. H. Jude 6*d.* on every copy sold.

"(3.) Mr. W. C. Newsam to supply Mr. W. H. Jude with such copies as he may require from time to time at 1*s.* 6*d.* per copy, any copies supplied to Mr. W. H. Jude not to be liable to the afore-mentioned royalty of 6*d.*" Opposite the first condition in the margin appeared the word "volume," and there were dots underneath indicating that it was intended to be repeated opposite the other conditions.

Mr. Jude retained the ownership of the plates which were lent to Mr. Newsam. By an agreement of November 8, 1902, Mr. Newsam assigned his rights under the agreement of July 27, 1900, to Reid Brothers, Limited.

Two other series of musical compositions, called "The Liedertafel Series" and "The Preacher-Musician," were brought out by Mr. Jude in 1900 and 1902 respectively. In June, 1903, a work entitled "Music and the Higher Life (abridged edition)" was published, containing thirty-six numbers from the original series, seven from "The Liedertafel Series," and two from "The Preacher-Musician Series," under an

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agreement made previously in the same year between Mr. Jude and Reid Brothers, Limited.

On April 15, 1903, Reid Brothers, Limited, registered themselves as proprietors of the copyright in "The Liedertafel Series." On August 13, 1903, they registered themselves as proprietors of the copyright of "Music and the Higher Life (abridged edition)," and on August 19, 1903, as the proprietors of the copyright of "The Preacher-Musician Series." They alleged that these entries were made with the knowledge and approval of Mr. Jude, but he denied this. In a letter of July 11, 1904, from Mr. Jude to the secretary of Reid Brothers, Limited, Mr. Jude wrote: "Kindly tell Mr. Newsam that the terms for the 'Preacher-Musician' and 'Liedertafel Series' had better be the same as 'Music and the Higher Life.'"

By a letter of February 20, 1905, from Mr. Jude to one J. H. Riley Mr. Jude stated as follows:—

"In consideration of your advancing me the sum of 100*l.* for twelve months, I hereby charge all my rights and interests in the work composed by me, and entitled 'Music and the Higher Life,' by way of security for the advance. In the event of my failing to repay the money advanced by you within the time specified, you have my full authority and permission to dispose of my said rights in any such manner as you may think fit, and I undertake and agree to execute any further assignment to complete this charge if called upon by you to do so."

Mr. Jude only repaid 20*l.* of this loan within the year, and on February 21, 1906, Mr. Riley, in consideration of Mr. W. C. Newsam paying him the sum of 80*l.*, agreed to assign to him all and every right in "Music and the Higher Life" acquired by him in the agreement of February 20, 1905. The sum of 80*l.*, the balance of the debt, had subsequently been tendered by the respondent.

Mr. Jude alleged that he was the sole composer of the music, and the sole proprietor of the copyright in each of the three books and compositions registered as aforesaid by Reid Brothers, Limited, and on March 2, 1906, gave notice of application as above mentioned. Reid Brothers, Limited, asserted that the copyright in "Music and the Higher Life" belonged to them—(*a*) under a

verbal agreement to assign it to W.C. Newsam on specified conditions; (*b*) under the assignment of July 27, 1900, to W. C. Newsam, and the further assignment by Newsam to Reid Brothers, Limited, dated November 8, 1902; (*c*) under the assignment of February 21, 1906, from J. H. Riley under his power of sale. The appellants alleged that on the faith of the first two agreements they had spent large sums in advertising the books.

Kekewich J. granted the application, and made an order for the expunging of the entries in question from the register. (1)

Scrutton, K.C. (*E. J. Elgood* with him), for the respondent, took the preliminary objection that no appeal lay from the order of Kekewich J. Before the Judicature Acts there clearly could have been no appeal in such a case. It is submitted that s. 19 of the Judicature Act, 1873, does not give such an appeal. Furthermore, the case comes without s. 20 of the Appellate Jurisdiction Act, 1876, which provides that an appeal shall not lie where by Act of Parliament the decision of any Court or judge whose jurisdiction is transferred to the High Court would have been final. In the case of *In re The Young Duchess* (2) Lord Coleridge C.J. and Wright J. expressed an opinion that no such appeal lay. [They also cited *Chappell* v. *Purday* (3); *Ex parte Davidson* (4); *Ex parte Davidson.* (5)]

P. O. Lawrence, K.C. (*Harold Hardy* with him), for the appellants, was not called upon to argue on the preliminary objection.

LORD ALVERSTONE C.J. delivered the judgment of the Court, overruling the preliminary objection on the ground that the case came within the decision of the House of Lords in *Wallsall Overseers* v. *London and North Western Ry. Co.* (6) and that an appeal lay under the Judicature Act, 1873, s. 19.

P. O. Lawrence, K.C., and *Harold Hardy*, for Reid Brothers, Limited, the appellants. The appellants do not attach much

(1) [1906] 2 Ch. 595.
(2) (1891) 8 Times L. R. 41.
(3) (1843) 12 M. & W. 303.
(4) (1853) 2 E. & B. 577.
(5) (1856) 18 C. B. 297.
(6) (1878) 4 App. Cas. 30.

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importance to "The Liedertafel Series" or "The Preacher-Musician Series," but the question as to "Music and the Higher Life (abridged edition)" is of importance to them. The first and main question with regard to that is whether the copyright in the original series "Music and the Higher Life" was assigned to Mr. Newsam by the agreement of July 27, 1900. Kekewich J. held that it was not, on the authority of *Stevens* v. *Benning*. (1) It is submitted that his decision on that point was not correct. The terms of the agreement in *Stevens* v. *Benning* (1) were materially different from those of the agreement of July 27, 1900. The words "sole and exclusive" were not contained in the agreement in that case. The operative words of the instrument in this case transfer substantially all that is included in the definition given by s. 2 of the Copyright Act, 1842, which defines "copyright" as "the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is herein applied." In the case of a subject-matter such as that in question here, the omission of the words "or otherwise multiplying copies" may be disregarded, because printing would practically be the only mode of multiplying copies. On the true construction of the agreement it gives the sole and exclusive right of printing and publishing, not only the series in volume form, but any number or numbers of the series separately. A transfer of the sole and exclusive right of printing and publishing a work, without limitation of time or place, or any other limitation, is a transfer of the copyright. If this be the true construction of the instrument, it gives the copyright as regards the thirty-six numbers of "Music and the Higher Life" included in "Music and the Higher Life (abridged edition)." As regards the numbers taken for that edition from "The Liedertafel Series" and "The Preacher-Musician Series" and those series themselves, it is contended that Mr. Jude's letter of July 11, 1904, makes the terms of the agreement of July 27, 1900, also applicable to those series; but, no doubt, if the decision of Kekewich J. as to the construction of that agreement is correct, the appellants must fail, so that the first question is what, upon its true construction, is the effect of that agreement.

(1) (1854) 1 K. & J. 168; (1855) 6 D. M. & G. 223.

The registration of the copyright of the three publications in question in the name of Reid Brothers, Limited, was by arrangement with Mr. Jude, or at any rate was assented to by him. There is no express provision in the Act to the effect that an assignment of copyright must be in writing. The necessity for a written assignment was inferred from the language of s. 15 of the Act: see *Leyland* v. *Stewart*. (1) The registration in this case may under the circumstances be regarded as an entry under s. 13 of the Act, which enables the proprietor of the copyright to assign his interest by making entry in the register of such assignment.

[LORD ALVERSTONE C.J. It is clear that, if Reid Brothers, Limited, had no written assignment by Jude of the copyright, they are not entitled to remain on the register as proprietors of the copyright.]

The copyright in "Music and the Higher Life" was included in the charge of February 20, 1905, given by the respondent to Riley, and the assignment by Riley of his rights under that charge on February 21, 1906, was an exercise of the power of sale given to him by the charge.

Scrutton, K.C., and *E. J. Elgood*, for the respondent, were not called upon to argue.

LORD ALVERSTONE C.J. In this case Kekewich J. has ordered to be expunged from the register three entries, whereby the appellants Reid Brothers, Limited, were registered as proprietors of the copyright in three publications called respectively "The Liedertafel Series of Carols," "The Preacher-Musician Series of Revival Songs," and "Music and the Higher Life (abridged edition)." The appellants' counsel have stated that the appellants do not attach much importance to the first two of those publications, but they strenuously contended that their clients were entitled to the copyright in "Music and the Higher Life (abridged edition)." In order to maintain their contention with regard to that, as well as with regard to the other publications, it is necessary for them to establish the proposition that their clients had become proprietors of the copyright in the series called "Music

(1) (1876) 4 Ch. D. 419.

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and the Higher Life" under the agreement of July 27, 1900. Whether that is so or not depends on the true construction of the terms of that agreement. At the time when it was entered into there had been published as a series under the title of "Music and the Higher Life" a number of hymns, in the case of some of which the respondent Jude appears to have been the author of both the words and the music, while in the case of others he was the author of the music only. In 1897 the respondent registered himself as proprietor of the copyright of "Music and the Higher Life." By the agreement of July 27, 1900, he gave to Mr. W. C. Newsam the "sole and exclusive right of printing and publishing the series of 'Music and the Higher Life,' and issuing the same in volume form"; and it is argued that that agreement must be taken to have been intended to pass, and did pass, the copyright in the series, because substantially it includes all that is included in the definition given in s. 2 of the Act, which defines "copyright" as "the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is herein applied." In order to see whether that is so, one must consider what the subject-matter is in respect of which the sole and exclusive right of printing and publishing is given by the agreement. I will assume that for this purpose the words are as strong as if they had included the words "or otherwise multiplying copies of," because, as the appellants' counsel contended, the subject-matter being a book, copies could only in practice be multiplied by printing. The agreement is headed thus: "'Music and the Higher Life,' series and volume." Then, "in consideration of Mr. W. H. Jude giving Mr W. C. Newsam the sole and exclusive right of printing and publishing the series of 'Music and the Higher Life,' and issuing the same in volume form, Mr. W. C. Newsam and Mr. W. H. Jude jointly agree to the following conditions." One cannot shut one's eyes to what is common knowledge in this connection, namely, that, in the case of collections of hymns, it is the ordinary practice for particular hymns taken from one hymn-book to be inserted in another, the leave of the author or owner of the copyright for such insertion being obtained for a consideration. The appellants are experienced publishers, and must be taken to have

known that there is, as a matter of business, a difference between the right to print and publish individual hymns forming part of a series and the right to print and publish the whole series in volume form. It seems to me that what is intended to be dealt with by the agreement is the right to print and publish the series, and to issue it, in volume form. All the terms of the agreement are, in my opinion, in accordance with that construction. Opposite the first condition in the margin, as a sort of rubric, is the word "volume," and there are dots indicating that the word is to be repeated opposite the other conditions. I quite agree that some of the conditions in this agreement are such as are often to be found in cases where there is intended to be an assignment of the copyright, but that is not in any way conclusive as to what was intended to be effected by this agreement. It is to be observed that, as was pointed out by Buckley L.J. in the course of the argument, condition 2 of the agreement makes no provision for the payment of a royalty to the respondent upon the sale of copies of individual hymns by Mr. Newsam; nor does condition 3 provide for copies of such being supplied to the respondent. The omission of such provisions seems inconsistent with the view that the copyright in the hymns, however published, was intended to be assigned. The conclusion to which I come on consideration of the terms of the agreement as a whole is that it was only intended thereby to give the sole and exclusive right of printing and publishing the compositions in question in a particular form, and not the copyright in the series. It is not really necessary to refer to authorities, such as *Lucas* v. *Cooke* (1), which shew that there may be a grant of the sole right to print and publish a composition in a particular form which does not amount to an assignment of the copyright. The question whether, in any case, there is an assignment of the copyright must depend on the terms of the particular document involved in the case.

The conclusion that the agreement of July 27, 1900, did not amount to an assignment of the copyright in the series "Music and the Higher Life" is sufficient to decide the case, but I think it right to say that I am by no means satisfied that the expressions

(1) (1880) 13 Ch. D. 872.

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in the correspondence, upon which the appellants' counsel relied as being sufficient to give the appellants the copyright in the case of "The Liedertafel Series" and "The Preacher-Musician Series," can properly be construed as having that effect. It is suggested that, when the respondent in his letter of July 11, 1904, used the words "Kindly tell Mr. Newsam that the terms for the 'Preacher-Musician' and 'Liedertafel Series' had better be the same as 'Music and the Higher Life,'" his intention was that the terms of the agreement of 1900 should be applicable to those two series. I am, however, not at all sure, having regard to the fact that there had in 1903 been an agreement with regard to the bringing out of the abridged and cheaper version of "Music and the Higher Life," which clearly did not itself pass the copyright, that the respondent did not mean to refer to that agreement and not to the agreement of 1900. The question, however, is immaterial in the view which we take of the construction of that agreement. I come to the conclusion, therefore, that what the parties to the agreement of July 27, 1900, were bargaining about was merely the right of printing and publishing the series called "Music and the Higher Life" in volume form, and that the terms of the agreement are quite consistent with the copyright remaining vested in the respondent.

It was argued that the appellants were entitled to be registered, because there was some oral arrangement or understanding whereby the respondent assented to and approved of the registration of the copyright in the series here in question in the name of Reid Brothers, Limited, and that the registration operated as an entry of an assignment of the copyright under s. 13 of the Copyright Act, 1842. It appears to me that this contention cannot be supported, because it is well settled that an assignment of copyright must be in writing, and there had been in this case no such assignment before the registration.

With regard to the only other point, namely, that arising on the document signed by Mr. Riley on February 21, 1906, I can express my view in a very few words. It is necessary for the appellants, in order to succeed, to shew that the transaction embodied in that document was a sale of the unincumbered property in the copyright. But from the terms used in the document, and

the circumstances of the case, it appears to me quite clear that it was only a transfer by Mr. Riley of his rights as mortgagee. For these reasons I think that the judgment of Kekewich J. was right, and that this appeal should be dismissed.

FLETCHER MOULTON L.J. I am of the same opinion for the same reasons. I will only add a few words on the principal point, namely, the construction of the agreement of July 27, 1900. It was admitted by the counsel for the appellants, subject to the question as to the effect of the document signed by Mr. Riley on February 21, 1906, that, unless that agreement passed the copyright in the series called "Music and the Higher Life" to Mr. Newsam, the appeal cannot be supported. Construing the agreement with reference to the surrounding circumstances, as we are entitled to do, I am satisfied that its subject-matter was not the copyright, but the sole and exclusive right of printing and publishing certain existing works in volume form, and perhaps, though I am more doubtful as to this, in their existing form, namely, as a series. That right is entirely different from the copyright in the series. If the copyright were assigned, that would give the assignee the full power of publishing the various compositions included in any way he chose, either separately or together, or in part. In my opinion no such right as that was intended to be dealt with by the parties to the agreement. Looking at the terms of it, including the heading, it is to my mind perfectly clear that it was solely intended to give a right of publishing certain compositions in a particular form.

BUCKLEY L.J. In this case there are two questions, each of which turns on the construction of a short document, and neither of which presents, I think, much difficulty. Before July 27, 1900, the respondent Jude, who was the author of certain hymns, had been publishing them in a series through the appellants, a publishing company, of which Mr. Newsam was a director. The respondent had paid the cost of printing and publishing the series, and it was sold by him. On July 27, 1900, he signed an agreement which the appellants allege to have amounted to an assignment of the copyright in the series.

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The terms of that agreement are as follows. It is headed with the words "Music and the Higher Life," in inverted commas, followed by the words "series and volume." That heading seems to me to indicate that what the parties contemplated was that the hymns, which had theretofore been published serially and sold separately, should be collected and published in a volume. Then come the operative words, "In consideration of Mr. W. H. Jude giving Mr. W. C. Newsam the sole and exclusive right of printing and publishing the series of 'Music and the Higher Life,' and issuing the same in volume form, Mr. W. C. Newsam and Mr. W. H. Jude jointly agree to the following conditions." Pausing there, if the words "sole and exclusive right of printing and publishing" passed the copyright in the series, the subsequent words "and issuing the same in volume form" would be mere surplusage and have no effect; but if, on the contrary, the intention was to give only the sole and exclusive right of printing and publishing in volume form, then they are intelligible and effective. It appears to me that what is given by the agreement is the sole and exclusive right of printing and publishing in a certain form, namely, volume form, the hymns which had been previously published in a serial form. The terms of the agreement, when looked at, clearly indicate, I think, that this was the intention of the parties. The word "volume" appears in the margin at the head of the first condition with marks underneath indicating that it is intended to be repeated with regard to the other conditions. The first condition provides that the cost of printing and issuing "the volume" is to be borne by Mr. W. C. Newsam. By the second condition a royalty of 6*d.* is to be paid to the author on the sale of each copy. This clearly means copy of the volume, and there is no provision for any royalty on the sale separately of any of the individual hymns contained in the series. Then comes the third condition, which names 1*s.* 6*d.* as the price of each copy, meaning plainly copy of the volume, but does not appear to throw much further light on the subject. The result, in my opinion, is that, on the true construction of the agreement, it did not pass the copyright in "Music and the Higher Life" to Mr. Newsam. The respondent would,

notwithstanding the agreement, still continue to have the right to publish and sell any of the individual hymns contained in the series, though not to publish those hymns in volume form, the exclusive right to do that being given to Mr. Newsam. If that be so, it is incompatible with there being an assignment of the copyright in the hymns.

Besides "Music and the Higher Life" there were published two other series of hymns of which the respondent was the author, namely, the "Preacher-Musician" and "Liedertafel Series"; and in 1903 "Music and the Higher Life (abridged edition)" was published under an agreement made in that year, which did not contain any assignment of copyright. That abridged edition contained, in addition to thirty-six hymns taken from the original series, certain hymns taken from the "Preacher-Musician" and "Liedertafel Series." In a letter dated July 11, 1904, the respondent wrote, "Kindly tell Mr. Newsam that the terms for the 'Preacher-Musician' and 'Liedertafel Series' had better be the same as 'Music and the Higher Life.'" The suggestion for the appellants is that the meaning of that was that the same terms should apply to the "Preacher-Musician" and "Liedertafel Series" as applied under the agreement of July 27, 1900, to "Music and the Higher Life." It does not matter whether that is so or not in the view which I take of that agreement, but I think that the reference was not to the agreement of July 27, 1900, but to the terms of the agreement with regard to "Music and the Higher Life (abridged edition)." That disposes of the first question raised.

The second question appears to me to be simpler still. On February 20, 1905, the respondent mortgaged all his rights (which would include the copyright) in "Music and the Higher Life" to one Riley by way of security for an advance of 100*l.* for the period of twelve months. On February 21, 1906, only 20*l.* of the mortgage debt having been repaid, the mortgagee Riley signed a document by which, in consideration of a payment by Newsam of 80*l.*, which was the balance of the mortgage debt outstanding, he assigned to Newsam all and every right in "Music and the Higher Life" acquired by him in the agreement of February 20, 1905. What was the right so acquired by him?

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It was the right not to the copyright, but to the copyright subject to the mortgagor's equity of redemption. The transaction, as expressed in the document, does not purport to be a sale of the mortgagor's rights, but an assignment of the rights which Riley had as mortgagee. That seems to me to be the proper construction of the words of the document looked at by themselves, but the circumstances of the case strongly confirm that view of their meaning; because, if what was done was intended to be an exercise by the mortgagee of his power of sale, it would have been his duty to sell at the full price obtainable for the copyright, whereas the amount paid was only 80*l.*, the balance of the mortgage debt. In my judgment the appeal fails and must be dismissed.

Solicitors: *Gibbs, White & Strong; James White & Leonard.*

E. L.

C. A. 1906 — *Aug.* 1.

In re SCHOLEFIELD.

SCHOLEFIELD *v.* ST. JOHN.

[1904 S. 4437.]

Conflict of Laws—Power of Appointment—Personalty—Execution—Foreign Domicil—Unattested Will—Extrinsic Evidence of Intention—Wills Act, 1837 (1 *Vict. c.* 26), *ss*, 9, 10, 27.

THIS was an appeal from the decision of Kekewich J. (1) On the case being called, counsel informed the Court that the parties, who were sui juris, had agreed to a settlement, and an order was made in the terms which had been agreed.

A. L. Morris, for the appellant.

T. T. Blyth, for the respondents.

Solicitors: *Burton, Yeates & Hart; Blyth, Dutton & Blyth*

(1) [1905] 2 Ch. 408.

J. R. B.

In re SLATER.
SLATER *v.* SLATER.

[1905 S. 3973.]

C. A.
1907
April 18, 19.

Will—Construction—Bequest—Will speaking from Death—Ademption—"Money invested in" Lambeth Waterworks Company—Transfer of Undertaking to Water Board—Compensation—Metropolitan Water Stock—Metropolis Water Act, 1902 (2 *Edw.* 7, *c.* 41), *s.* 2; *Fourth Schedule—Wills Act*, 1837 (1 *Vict.* *c.* 26), *s.* 24.

A testator bequeathed "the interest arising from money invested in (inter alia) the Lambeth Waterworks Company" to a legatee for life and then over. Between the dates of his will and death the undertaking of the Lambeth Waterworks Company was acquired by the Metropolitan Water Board under the provisions of the Metropolis Water Act, 1902, and a sum of Metropolitan Water Board stock had been issued to the testator as compensation in respect of the ordinary stock which at the date of his will he held in the Lambeth Waterworks Company:—

Held, that the Metropolitan Water Board stock did not pass under the bequest.

Decision of Joyce J. affirmed.

Appeal from a decision of Joyce J. (1)

By his will dated February 8, 1904, the testator, J. A. Slater, made the following bequest: "To Catherine Pontin Slater I bequeath the interest during her life arising from money invested in the following viz., (1.) Consols (2.) West Surrey Water Company (3.) Anglo-Romano Gas Company (4.) New Jersey Railway bonds (5.) Lambeth Waterworks Company (6.) William Owen Limited (7.) bond for 1000*l.* sterling on Meggatland House and grounds Slateford Midlothian." On the death of C. P. Slater the testator directed the income arising from these properties to be divided amongst his sisters, and on the death of the last survivor he directed the capital to be divided amongst certain other persons.

The testator died on May 15, 1905.

At the date of his will there was standing in the name of the testator in the books of the Lambeth Waterworks Company 1075*l.* Lambeth Waterworks 10*l.* per cent. stock.

(1) [1906] 2 Ch. 480.

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By the Metropolis Water Act, 1902, it was provided that as from June 24, 1904, the undertaking of each of the metropolitan water companies (including the Lambeth Waterworks Company) should be transferred to and vested in a water board created by the Act and called the Metropolitan Water Board, and that the Water Board should pay to each company as compensation for the transfer of their undertaking a sum to be determined, in default of agreement, by arbitration under the Act, but the sum so payable might, if the Water Board and the company so agreed, be discharged wholly or partly in water stock. On August 2, 1904, the directors of the Lambeth Waterworks Company prepared a scheme under the Fourth Schedule of the Act for the application and distribution of the compensation awarded to the company under the Act; and under that scheme, on December 27, 1904, there was issued to the testator in respect of his holding the nominal amount of 3739*l.* 13*s.* 2*d.* Metropolitan Water Board stock. The testator was possessed of this stock at the date of his death.

A summons was taken out by the executors of the will for the determination of the question whether the bequest above set out comprised the sum of 3739*l.* 13*s.* 2*d.* Metropolitan Water Board stock, or whether the same formed part of the testator's residuary estate.

Joyce J. held that the Water Board stock did not pass under the bequest, but fell into the residue.

C. P. Slater appealed.

T. R. Hughes, K.C., and *T. T. Method*, for the appellant. (1.) This was a gift of the interest arising from money which at the date of the will was invested in stock of the Lambeth Waterworks Company, and the gift applies so long as the money can be followed, notwithstanding any change of investment: *Moore* v. *Moore* (1); *Toole* v. *Hamilton* (2); *Lee* v. *Lee*. (3) (2.) This is substantially the same investment. The Metropolis Water Act was passed before the date of the will, and in substance this was water stock at that date. Where the only change in the

(1) (1859) 29 Beav. 496. (2) [1901] 1 I. R. 383.
(3) (1858) 27 L. J. (Ch.) 824.

subject-matter of the bequest is in name and form, and it remains substantially the same thing at the date of the death, there is no ademption: *Oakes* v. *Oakes*. (1) There shares were converted into stock after the date of the will, and it was held that the stock passed under the bequest.

[SIR GORELL BARNES, PRESIDENT. That case is said to be overruled by *Morrice* v. *Aylmer*. (2)]

That was on another point. By the terms of the Act the primary obligation of the Water Board was to pay in cash, but any of the metropolitan waterworks companies might agree with the Water Board to take water stock instead. The individual members of the company had, however, no option in the matter. Ademption depends upon the presumed intention of the testator to deprive the legatee of the thing which he has given him, and when the nature of the thing has been changed, not by any act of the testator, but by the Legislature, that does not operate as an ademption. It would be a serious hardship that this legacy should be taken away by something over which the testator has no control: *Partridge* v. *Partridge* (3); *Bronsdon* v. *Winter*. (4) At the date of the will the Lambeth Waterworks stock was subject to the provisions of the Metropolis Water Act, and this fact must be taken to have been known to the testator; and in that view of the case this is merely a case of misdescription: *In re Pilkington's Trusts* (5); *Goodlad* v. *Burnett* (6); *Cooper* v. *Martin* (7); *In re Lowman*. (8)

[KENNEDY L.J. In *Jones* v. *Green* (9) a testator, after bequeathing the income of some shares specifically, became a lunatic, and the shares were sold and the proceeds invested in Consols by an order in the lunacy, and it was held that the gift of income was adeemed by the sale.]

That is a different case, because the order of the Lord Chancellor, who has an almost despotic power over the estates of lunatics, was looked upon as the act of the testator himself.

[COZENS-HARDY M.R. referred to *In re Bridle* (10), where

(1) (1852) 9 Hare, 666.
(2) (1874) L. R. 10 Ch. 148.
(3) (1736) Cas. t. Tal. 226.
(4) (1738) Amb. 57.
(5) (1865) 6 N. R. 246.
(6) (1855) 1 K. & J. 341.
(7) (1867) L. R. 3 Ch. 47.
(8) [1895] 2 Ch. 348.
(9) (1868) L. R. 5 Eq. 555.
(10) (1879) 4 C. P. D. 336.

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a gift of a mortgage was adeemed by the payment off of the mortgage.]

The reasoning of that case is not satisfactory, though the decision may perhaps be justified on the ground that a mortgage is non-existent after it has been paid off; but there is a distinction between a gift of a mortgage and a gift of money invested on a mortgage.

[KENNEDY L.J. referred to *In re Robe.* (1)]

That case was not rightly decided, and ought not to be followed. The test is, has the subject-matter ceased to exist, or has it only changed its form? *Morgan* v. *Thomas* (2) and *In re Johnstone's Settlement* (3) are in favour of the appellant on this point. *Sidney* v. *Sidney* (4) and *Harrison* v. *Jackson* (5) are distinguishable from the present case; and it was not necessary for the decision of the latter case for Jessel M.R. to criticize *Le Grice* v. *Finch* (6), which, it is submitted, is good sense and good law.

[KENNEDY L.J. referred to *In re Lane* (7), where a change of debentures into debenture stock was held to adeem the gift.]

That was an extreme case, but Hall V.-C. there held that in fact the change was a change in substance, and that the case did not fall within *Oakes* v. *Oakes.* (8)

[COZENS-HARDY M.R. referred to *In re Freer.* (9)]

That was a case in lunacy, and is not in point. There is no authority which requires the Court to support the decision of Joyce J. in this case, and that decision clearly defeats the testator's intention.

Warmington, K.C., and *Younger, K.C.* (with them *Newton*), for the residuary legatees. The question is whether at the date of his death the testator possessed anything which could properly answer the description of the interest of money invested in the Lambeth Waterworks Company. In order to succeed the appellant must shew—(1.) that if the testator had purchased additional stock in the Lambeth Company that would not have passed, and (2.) that the testator meant to give the money, however

(1) (1889) 61 L. T. 497.
(2) (1877) 6 Ch. D. 176.
(3) (1880) 14 Ch. D. 162.
(4) (1873) L. R. 17 Eq. 65.
(5) (1877) 7 Ch. D. 339.
(6) (1817) 3 Mer. 50.
(7) (1880) 14 Ch. D. 856, 858.
(8) 9 Hare, 666.
(9) (1882) 22 Ch. D. 622.

invested, but neither of these contentions can be maintained. By virtue of s. 24 of the Wills Act, in the absence of a contrary intention, a will speaks from the death as regards the property comprised in it; it is an ambulatory instrument. You cannot consider the property that existed at the date of the will, and you must gather the testator's intention from the words he has used and not from speculation as to what he would probably have desired: *In re Moses* (1), and on appeal to the House of Lords, sub nom. *Beddington* v. *Baumann.* (2) There is here no contrary intention sufficient to exclude the operation of the section: *In re Portal and Lamb.* (3) Assuming that the gift is to be construed as at the date of the will, it has been adeemed by the change in the subject-matter. The Lambeth Waterworks Company has been dissolved and compensation paid, and this water stock is not an interest in the Lambeth Company at all: *Ashburner* v. *Macguire* (4); *Frewen* v. *Frewen* (5); *In re Gray* (6); *In re Lane.* (7)

Vernon, for the executors.

Method in reply.

COZENS-HARDY M.R. This case has been most elaborately and ably argued, but I do not think that it will be necessary in the judgment which it is my duty now to deliver to discuss many of the authorities which have been cited to us.

The testator in this case in February, 1904, made a bequest which certainly has the merit of brevity. It is a bequest which all parties admit to be a specific bequest. It is a specific bequest, the subject-matter of which I will deal with presently, of certain property the interest of which is to go to the widow for life, on her death to the widow's sisters in equal shares for their lives, and on the death of the last survivor the capital is to be divided between a class of persons whom I need not refer to. It is a complete disposition of certain specific properties. Now what are the properties which are thus specifically given by the testator,

(1) [1902] 1 Ch. 100, 123.
(2) [1903] A. C. 13, 15.
(3) (1885) 30 Ch. D. 50.
(4) (1786) 2 Bro. C. C. 108.
(5) (1875) L. R. 10 Ch. 610.
(6) (1887) 36 Ch. D. 205.
(7) 14 Ch. D. 856.

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whose widow is entitled to the income for life? These are the words:—[His Lordship read the bequest.] There are two points which arise having regard to one fact which I must now state, that by virtue of an Act of Parliament passed in the year 1902, that is to say, before the date of this will, the undertaking of the Lambeth Waterworks Company was purchased by the Metropolitan Water Board, and by virtue of a scheme prepared in accordance with the Act the testator acquired certain Metropolitan Water Board B stock. It is contended on behalf of the appellant that that Metropolitan Water Board B stock is to be substituted for the Lambeth Waterworks stock, and that it ought to go to the tenants for life, and to the persons ultimately entitled to the capital of this specific bequest. That view is opposed on two grounds. It is said first that the provisions of s. 24 of the Wills Act require that this bequest should be construed as to the property comprised therein as speaking from the death, and that if so, there being nothing upon which it can operate—there being at that time no Lambeth Waterworks Company stock—the bequest fails. Alternatively it is said that even if you are in effect to read into the language of this bequest words which make it specific, and applicable only to the stock which the testator had at the date of the will, still that which has since happened has adeemed that specific legacy.

Joyce J. dealt with the case only on the former of those grounds. He held that s. 24 of the Wills Act applied, there being no sufficient contrary intention to exclude the operation of that section, and that the claim of the specific legatee failed.

I agree with the learned judge in that view. It seems to me that this is a will in which there is no contrary intention at all, or at any rate no sufficient intention to exclude the operation of s. 24. Let me suppose, what is quite possible, that in the interval between the date of his will and of his death the testator had purchased in the market 1000*l.* more of this very Lambeth Waterworks Company's stock, and that he had died before the completion of the transfer of the undertaking under the scheme. It seems to me that the argument which must then have been addressed to the Court on behalf of the specific legatee, that a gift of "my Lambeth Waterworks Company's stock" is a gift of

"the Lambeth Waterworks Company's stock which I may have at my death," must have succeeded, and that it would have been irrelevant to consider whether the amount which the testator had at his death was greater or less than the amount which he had at the date of the will. Of course the same remark applies to the Consols and to the other items of the bequest, with the sole exception of the bond for 1000*l.* sterling. Possibly it might apply to that also, but I do not think that there is sufficient in the mere inclusion of this item No. 7 to enable us to say that we ought to read this bequest as applying only to property which the testator had at the date of his will. That is sufficient to dispose of this appeal, and I do not think that it is necessary to go through and discuss the various authorities which have been referred to by Joyce J., for it has not been seriously argued that, if that be the true construction of the will, the appeal can succeed on the mere question of tracing the money.

But, supposing I am wrong in that, and that the appellant is right on this point, and that by construction I am to read this bequest as meaning "I bequeath the interest during her life arising from the money invested in the following particulars which I now hold," then you are face to face with the question, Has not this gift, so far as the Lambeth Waterworks Company's stock is concerned, been adeemed by the subsequent transaction? Speaking for myself, although it may not be absolutely necessary for the decision of this case, I think it has been. There was a time when the Courts held that ademption was dependent on the testator's intention, on a presumed intention on his part; and it was therefore held in old days that when a change was effected by public authority, or without the will of the testator, ademption did not follow. But for many years that has ceased to be law, and I think it is now the law that where a change has occurred in the nature of the property, even though effected by virtue of an Act of Parliament, ademption will follow unless the case can be brought within what I may call the principle of *Oakes* v. *Oakes* (1), in which Turner V.-C. held that a bequest of shares in a railway company was not revoked by the subsequent change of those shares into stock by reason of a vote of the

(1) 9 Hare, 666.

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company under the powers of their special Act. At the end of his judgment the Vice-Chancellor says this (1): "The testator had this property at the time he made his will, and it has since been changed in name or form only. The question is, whether a testator has at the time of his death the same thing existing, it may be in a different shape,—yet substantially the same thing." Remembering the extraordinary accuracy of the language used by Turner V.-C., I think there is great force in those words which he used "changed in name or form only, . . . yet substantially the same thing." Applying that to the present case, in the first place the Lambeth Waterworks undertaking was sold, and sold for cash—sold, that is, for cash in this sense, that the price was ascertained in cash and could only be paid otherwise than in cash if both the vendors and the purchasers agreed to a scheme providing for satisfying the purchase-money otherwise. That agreement was obtained in the present case. A scheme was prepared, and the Water Board B stock was allotted to the testator in respect of his shares in the old company. But can it possibly be said that that is the same thing? Instead of having shares in a company dependent for its profits upon water rates which they, and they alone, were able to demand from the limited area within the ambit of their Act of Parliament, the Water Board B stock is a stock which is payable out of water rates levied not merely upon the Lambeth Waterworks area, but upon the whole of the metropolitan area, and, I think, also on some districts even outside the metropolitan area. But, more than that, in the event of the water rates being insufficient to provide for the interest the present stock has a claim upon the rateable property in London, and any deficiency has to be made good out of the general rates. I cannot bring myself to say that that is the same thing. I feel bound myself to adopt the view taken not in one case only, but in many, that you have to ask yourself, Where is the thing which is given? If you cannot find it at the testator's death, it is no use trying to trace it unless you can trace it in this sense, that you find something which has been changed in name and form only, but which is substantially the same thing. One

(1) 9 Hare, 672.

authority has been adduced to us which is certainly very near the present case: it is the case of *In re Gray* (1), decided by Kay J. It is quite true that the observations made by that learned judge were not necessary for the decision of the case, for he first held that the legacy in that case was general and not specific, but he went on to discuss the question what would happen assuming that the gift was specific. In that case the testator bequeathed certain shares in an old unlimited bank. In the interval between the date of his will and of his death the company was registered under the same name with the addition of the word "Limited," and the shares were subdivided up, each 100*l.* being converted into two shares of the nominal value of 60*l.*, and the learned judge held that, even assuming the legacy had been specific, the shares in the limited company were not so completely identified with the old shares as to prevent the application of the doctrine of ademption.

On this ground also I think that the decision of Joyce J. was right, and that this appeal must be dismissed.

SIR GORELL BARNES, PRESIDENT. I am of the same opinion. It seems to me that the first matter that the Court has to determine in this case is what is the date from which the will is to be treated as speaking, that is to say, is it to be treated as speaking in this case from the date of the will itself or from the date of the testator's death, which was on May 15, 1905, rather more than a year after the date of the will?

In determining that question a guide is to be found in s. 24 of the Wills Act, which provides that "every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." So that prima facie the will in this case would have to speak and take effect as if executed immediately before the death of the testator. Then, I think, it rests upon those who assert that the will is to take effect as from a different date to establish that by shewing that there was a contrary intention appearing on the will. The contrary

(1) 36 Ch. D. 205.

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intention in this case is said to be gathered from the earlier words of the clause which the Master of the Rolls has read, and which I need not read over again, and also from item 7, the mortgage bond on some Scotch property; but it seems to me that, having regard to the language used and the consideration which has been pointed out by the Master of the Rolls as to the effect which most probably would have to be given to subsequent purchases of any of the stocks which are mentioned in the clause, it is not sufficiently made out that there is a contrary intention appearing on the face of the will. That is the ground on which Joyce J. has decided this case, and with that ground I agree.

But I desire to say one word, and one word only, upon the other point, supposing that this clause ought to be read as dealing with the property as it existed at the date of the will. That brings into consideration the question, which has been more elaborately argued possibly than the other branch of the case, as to the effect of the subsequent facts upon that part of the property which was at the date of the will invested in the Lambeth Waterworks Company. It is said, on the one hand, that the stock held by the testator at his death, the Metropolitan Water Board B stock, is to take the place of the investment which was at the date of the will held by him in the Lambeth Waterworks Company. On the other hand, it is said that the old stock having ceased to exist there is nothing to take its place, and that, to use a word which is found in some of the cases, the "extinction" or "annihilation" of the stock has put an end to it and that the Metropolitan Water Board B stock cannot be substituted for it. It seems to me upon a consideration of the authorities that, having regard to the facts of this case, there is an extinction or annihilation of the original property, which has put an end to it, and that this other stock which is taken for it cannot be treated as substituted for it in such a sense as is to be found in some of the cases which have been referred to where a change in the stock, not in substance but in form, has been held not to destroy its identity. I think, when one considers the terms of the Metropolis Water Act, 1902, and the scheme which is there referred to, it is obvious that the whole undertaking of the Lambeth Waterworks Company was to be acquired by purchase

by the Metropolitan Water Board on the basis of the provisions of that Act and scheme. So the result was that this was an actual sale of this property and a complete transfer of the undertaking of which those interested had notice, and the testator, amongst others, appeared to have had notice of it in the month of June, 1904. Although it is, in a sense, compulsory upon the shareholders there is in fact an acceptance of the proposals which were made, and it is extremely difficult, it seems to me, to differentiate that position in a case of this kind from the case of an ordinary sale by the testator of the stock which existed at the date of the will. In one or two of the cases where stock originally held by a lunatic has been sold under the order of the Court the sale has been treated as being a sale, in effect, by the testator, although effected by those who represented his estate for the time being, and in those cases there has been considered to be an ademption or an extinction of the interest.

I feel, myself, great difficulty on the facts of this case in differentiating the case of a sale of the testator's property by his representatives from this particular case, and I do not think that it is necessary to go into the question how far the matter would have to be considered from a different point of view in cases where there has been a mere change in name or form, not in substance, of the stock, as, for example, where a railway company is consolidating its various stocks, but for all practical purposes the consolidation leaves the persons interested in those stocks in exactly the same position as they were in before. This seems to me to be an entirely different case, because there is an absolute annihilation or extinction of the interests in the Lambeth Waterworks Company, and there is a compensation awarded in the shape of an allotment of different stock in a different concern on a different footing altogether.

Therefore I agree, though I do not think that it is necessary to express a positive view about this part of the case, with the observations upon it which have been made by the Master of the Rolls. In my opinion, the appeal fails.

KENNEDY L.J. I think that the decision is one, as my brethren have stated it, from which it is impossible for me to dissent. I

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Kennedy L.J.

think that the body of authority is in favour of the views which have been so clearly stated by the Master of the Rolls. But upon one branch of the case I have come to that conclusion with some hesitation. We have nothing whatever to do with questions of hardship, or with questions of intention outside that which appears to be the true inference or the best inference from the language of the will itself, but I have felt more difficulty than has been felt by the other members of the Court in setting aside the view for which Mr. Methold especially has contended, namely, that according to a reasonable and fair construction of the actual words in the will, what was intended by the testator was that his widow should take "the interest during her life arising from money which is at the present moment invested in the following." I certainly should not venture without the greatest hesitation to differ from the opinion of those who have far greater experience and knowledge in the construction of documents of this kind than I have, but I think that is the meaning which, acting on my own unaided opinion, I should have been inclined to put upon that clause. And if that be the right reading of it, I have felt a great deal of difficulty in seeing that there was an ademption. No doubt, as the Master of the Rolls has observed, the case is very near *In re Gray.* (1) But, in the first place, what is said by the very learned judge who delivered the judgment in that case is obiter, as he states himself; and, in the second place, he puts forward as being essential to his view a fact which I think is not clearly proved to exist in this case, that the acceptance of the substituted property was the voluntary act of the testator, because in the passage in which he sums up his view, referring to *In re Lane* (2), he says (3), "After the date of the will he"—that is, the testator in *In re Lane* (2)—"exercised an option given to him by the company who had issued the debentures, and converted them into debenture stock, and it was held that the debenture stock did not pass. Therefore," he continues, "if this were a specific gift"—and both sides agree here that this particular case is one of specific gift—"it seems to me

(1) 36 Ch. D. 205. (2) 14 Ch. D. 856.
(3) 36 Ch. D. 210.

clear that the testator having accepted, as he was not in the least bound to do, shares in the incorporated company after the date of his will instead of the shares which he then held in the unincorporated company, those shares in the incorporated company were so entirely a different thing from the shares in the unincorporated company that the legacy would be adeemed and that they would not pass." I am not going into the facts, because, as I say, I feel myself bound to agree in the conclusion which the Master of the Rolls and the President of the Probate Division have arrived at. But, assuming as Kay J. did in that case, that there is a distinction between a change effected by the voluntary act of the testator and a change effected otherwise, the fact here appears to be that this testator had really no choice as to his keeping the investment as it existed at the date of his will. The fact was that Parliament put an end to it, leaving the compensation, as between cash and water stock, to be decided by a majority of the shareholders in the company, and I have felt that it is not quite reasonable or fair to speak of a man having an option when his only option is in regard to the form in which he will accept compensation for that which he is obliged to take out of the investment described in the will. Ought the doctrine of ademption to be applied to a case of that sort? For that proposition I cannot say that I have seen in any of the cases cited sufficient authority. The nearest is this dictum of Kay J., of course deserving of the very highest respect, but guarded in such a way as to make it doubtful whether it has any application to the present case. But, if the view which I think I am bound to take according to the authorities is right, viz., that the provisions of s. 24 of the Wills Act require that this bequest should be construed as speaking from the death of the testator, and that there was no sufficient contrary intention appearing by the will, we need not consider the question of ademption at all.

I agree that this appeal must be dismissed.

Solicitors: *Maude & Tunnicliffe; Gery & Brooks.*

H. B. H.

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ANKERSON *v.* CONNELLY.

[1905 A. 1238.]

Ancient Lights—Easement—Rebuilding of Dominant Tenement—Alteration of Easement—Diminution of Light by Owner—Burden on Servient Tenement—Destruction of Easement—Declaration that there is no Easement.

Where before the rebuilding of premises having ancient lights a partial interference with these lights by the owner of the servient tenement would not be sufficient to entitle the owner of the dominant tenement to an injunction, the same amount of interference, even though completely blocking up the remnant of ancient light left after the rebuilding, will not be an actionable wrong to be restrained by injunction.

Colls v. *Home and Colonial Stores, Ld.*, [1904] A. C. 179, applied.

Decision of Warrington J., [1906] 2 Ch. 544, affirmed on the facts.

Appeal from Warrington J. (1)

The question raised by this appeal was whether the owner of a dominant tenement possessing ancient lights could, after rebuilding and reconstructing his premises, still prevent an interference by the owner of the servient tenement with so much of the old light as now passed through the new windows under the altered circumstances brought about by the rebuilding.

The facts as to the position and character of the buildings belonging to the plaintiffs and the defendant are given in more detail in the report in the Court below, but the following summary is sufficient to make this report intelligible.

The plaintiffs were the owners of a piece of vacant land formerly the site of No. 170, King's Cross Road. This land adjoined the defendant's premises, No. 172, which consisted of a small house, about twenty feet deep from the south front, with a back yard open to the sky. In this house there were two ancient lights on the ground floor looking into the yard. At the other end of this yard was a lean-to shed, nine feet high at the back, and open the whole of its width. In the north-east corner of

(1) [1906] 2 Ch. 544.

this shed was a small window, also an ancient light; the light to the shed was derived mainly from its open south side and partly from this small window. The windows on the ground floor were lighted from the north, over the shed, and from the open space over the yard; they also received lateral light from the east over a low wall some five feet high between the premises of the defendant and the plaintiffs.

The defendant pulled down No. 172 and rebuilt upon the site and upon some adjoining land a much larger building. The defendant attempted to preserve his ancient lights, but he raised the east wall between the yard and the plaintiffs' land, and left in it the small window to the shed and two other apertures to give light to the yard, and indirectly to the windows. The yard, however, was otherwise entirely covered in, a structure of some kind being built over it, so that all light was shut out from the ground floor windows except what passed through these apertures in the east wall.

In May, 1905, the plaintiffs, being anxious to build on their vacant land and wishing to test the defendant's right to light, erected hoardings some eight feet high on their own land, which prevented any access of light to the small window and the other two apertures in the new wall. The defendant pulled down these hoardings; the plaintiffs thereupon brought this action against him for a declaration that the defendant was not entitled to any easement over the plaintiffs' land for light and air in respect of any of the windows or openings or otherwise. There was evidence that the effect of what the defendant had done in the rebuilding was to destroy at least three-fourths of the light he had originally enjoyed, so that in the new state of the buildings a hoarding eight feet high would most materially interfere with the access of light to the small window, and to the two windows inside the covered-in yard, whereas before the rebuilding it would not have caused such an interference as would, since the decision in *Colls* v. *Home and Colonial Stores, Ld.* (1), have justified an injunction.

Warrington J. held that the defendant had increased the burden on the plaintiffs' land, but that he no longer had any

(1) [1904] A. C. 179.

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right which could be enforced, and consequently that the plaintiffs were entitled to the declaration they claimed.

The defendant appealed.

Cave, K.C., and *E. P. Hewitt*, for the appellant. The defendant does not seek to increase the burden on the plaintiffs' land or to extend his own rights; he is only trying to preserve the ancient light that is left to him, and if he can shew an interference which in the old state of things would be actionable, then he can still maintain an action notwithstanding the rebuilding. If the decision appealed from is right, then there is an end to cases like *Tapling* v. *Jones*. (1) The learned judge has held that by this rebuilding the defendant has increased the burden on the plaintiffs' land, and that, as it is impossible to sever the burden and say that the defendant was still entitled to impose upon the plaintiffs' land the burden which had previously existed, the defendant could no longer maintain an action for interference with his ancient lights, with the result that any blocking up of windows amounts to an abandonment of all rights in respect of the residue of the ancient lights.

[Sir Gorell Barnes, President. The learned judge seems to have set himself to answer a more difficult question than he need have done. On the facts, the defendant by his own act has blocked out 75 per cent. of his ancient light, and so any interference with the remaining 25 per cent. is of more consequence to him.]

If an owner is entitled to light from several quarters, and blocks out the light from one quarter, his right to light from the remaining quarters is in no way lessened; there is no such thing as forfeiting a right to light by an innocent action of that kind. The Prescription Act, 1832 (2 & 3 Will. 4, c. 71), provides that, once acquired, the right is "indefeasible," and an easement of this kind cannot be forfeited by an attempt to extend the right or by blocking up a part of it: *Tapling* v. *Jones*. (1) Blocking up part of an ancient light in the course of rebuilding is an innocent act which in no way alters the rights of the adjoining owner. There were three ancient lights, which have been

(1) (1865) 11 H. L. C. 290.

preserved in the new building, and if it is shewn that a substantial part of the old light is interfered with an injunction will be granted: *Newson* v. *Pender* (1); *Scott* v. *Pape*. (2) The evidence does not shew that these hoardings would not have been actionable in the old state of the buildings. The small window in the shed looking east is absolutely blocked by them. A partial interference by the owner is no bar to an action to prevent a subsequent interference by others: *Baxter* v. *Bower* (3); and an owner is not precluded from obtaining an injunction by the fact that he has himself contributed to a diminution of the light: *Staight* v. *Burn*. (4)

[Sir Gorell Barnes, President. Those cases only amount to this, that diminution of light by the plaintiff is not a ground for saying that he has no right at all; here you have practically blocked out all your old light.]

Colls v. *Home and Colonial Stores, Ld.* (5), only shews that a plaintiff cannot maintain a claim for an easement for an unusual quantity of light. The defendant here never had too much light, so that any interference, even in the original state of the premises, was material.

[Kennedy L.J. You have so altered your premises by the rebuilding that it is now impossible to say what would have happened if these hoardings had been put up before the rebuilding.]

They would certainly have blocked out the small window in the shed. That light is still required; the defendant has done nothing to shew that he intended to give up his rights to the other lights, and he is still entitled to the protection of the Court.

George Wallace, for the respondents, was only called upon on the question of the obstruction to the small window in what was the shed. This small window contributed very little light to the shed, which was mainly lighted by the opening all along its front; the light from this window was not really material, and since *Colls* v. *Home and Colonial Stores, Ld.* (5), the defendant

(1) (1884) 27 Ch. D. 43.
(2) (1886) 31 Ch. D. 554.
(3) (1875) 44 L. J. (Ch.) 625.
(4) (1869) L. R. 5 Ch. 163.
(5) [1904] A. C. 179.

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could not have obtained an injunction for any obstruction to this window, and therefore he could not do so now.

[He was stopped.]

COZENS-HARDY M.R. In my view this case really does not involve the very serious and important question of law which Mr. Cave has invited us to deal with. I think that the learned judge, in spite of one or two sentences in his judgment with which I do not quite agree, really intended to decide as a matter of fact that the reconstruction and change in character of the buildings had so destroyed the ancient lights and the nature of the house to which they belonged in its original state that the blocking up recently effected by the plaintiffs' hoardings was not of such a nature as to entitle the defendant to an injunction against the interference with any of his ancient lights.

Before the decision in *Colls* v. *Home and Colonial Stores, Ld.* (1), I have no doubt that Mr. Cave's clients would have been held to have been right, but since the decision in *Colls* v. *Home and Colonial Stores, Ld.* (1), which it is our duty to apply loyally and fully in every case that comes before us, it is no longer sufficient for a plaintiff to say, "Oh, you are depriving me of a portion of light, and a portion of light which is so obviously important to me—because it is the only light which I by acts of my own have chosen to leave to my own premises—that I am entitled to an injunction." Lord Davey points out (2) that it is not enough to say that real damage may be occasioned by what the defendant is doing, because the real damage may be occasioned by an alteration in the internal structure of the premises; and in another passage of the same judgment (3), which I will not read at length, he seems to indicate that there must be substantial identity in the altered premises with the old ones before you can obtain the protection of ancient lights. What do we find here? [Having stated the facts as to the original condition of the defendant's premises and the effect of the rebuilding, his Lordship continued:—]

Now, looking at the old house and the new structure, I feel

(1) [1904] A. C. 179. (2) [1904] A. C. 196.
(3) [1904] A. C. 202.

very great difficulty in saying that there is any substantial identity between the old building and the new which will entitle the defendant to the protection of the Court. Not only did the defendant entirely alter the original structure, but he "boxed in," as the phrase is, the yard so completely, not merely by a floor across the top of it, but by building up to some extent and closing up the east wall (leaving, it is true, some comparatively small openings through which a certain amount of lateral light would come), that, according to the evidence of his own principal expert witness, he has blocked out "practically the whole" of the original light. [After referring in detail to the expert evidence on this point, his Lordship continued:—]

In a case like that it seems to me that when the defendant by his own act has blocked out practically the whole of the light which the room had before, it does almost necessarily and inevitably follow that the obstruction (even the complete obstruction) of the small remnant of light which remained would not by itself have been an actionable wrong in respect of the old light to the premises, and that, I think, is the view which the learned judge really took. I do not imagine for a moment that the learned judge intended to lay down the general proposition that any alteration by a house owner of part of the lights which light his house, by blocking up a window, or something of that kind, is an abandonment or destruction of all his rights in respect to the residue of the ancient lights. No such idea was, I believe, in the learned judge's mind, and certainly, in so far as I think this appeal ought to be dismissed, it must not be understood that, speaking for myself, I intend to give any support whatever to that view. But, dealing with a case like this, I think the learned judge was right in saying that what the defendant had done had substantially destroyed all the lights in the house and that it was a case of de minimis which was left. The mere fact that there might be a little trace of light coming through a portion of the old openings was not of such a nature as to entitle the defendant to an injunction. So much for the windows on the ground floor of the house. The learned judge said, and felt I think, that there was a little more difficulty about the light to the small window which previously lighted the

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shed; but there again I have come to the conclusion, as a matter of fact, that the learned judge was right. This building was a mere open shed, or an open lean-to. There was this small window almost up in the roof, considerably higher than the posts opening into the yard; and I ask myself, that being the state of the shed, could an action have been maintained since *Colls* v. *Home and Colonial Stores, Ld.* (1), merely in respect of the blocking up of that little light in the top of a shed which nowhere else was glazed and had ample light from the whole large open front? I think not. What the defendant has done is that he has made a great warehouse, and he has replaced in the position of this old shed window a new light which undoubtedly may be of more importance to the new building than the old light was to the old shed; but there again I am not prepared to say that the learned judge was otherwise than perfectly right in the view which he took, that, when a man having an out-house or shed with a light which would not be entitled to the protection of the Court as the law now stands chooses to erect upon it a fine house and put a new window in that place, he is not entitled thus to increase the burden which he has imposed upon his neighbour the owner of the servient tenement.

On these grounds I think the learned judge was right in coming to the conclusion which he arrived at. Whether his declaration is quite in the proper form is a matter which we need not discuss, for in substance I think the plaintiffs were right and were entitled to the costs of the action, and they are also entitled to the costs of the appeal.

SIR GORELL BARNES, PRESIDENT. I agree with the decision of the learned judge who tried this case, but I do not quite accept the reasoning by which he arrived at his conclusion, and if I had to decide this case on the legal points which have been raised in argument I should require to consider the matter carefully, and I might not come to quite the same conclusion that he did with regard to the legal question. But it seems to me sufficient to say that in this case the matter may be disposed of

(1) [1904] A. C. 179.

purely upon the facts, and by an answer to this simple question, "Did the plaintiffs do anything which they were not entitled to do before the alterations which were effected by the defendant?" That is a question of fact which I do not think was considered by the learned judge, although it is possible to infer from some of his language that he may have had that point in his mind. The answer to that question turns upon the facts. I do not desire to read again that passage from the evidence of the principal surveyor who was called on behalf of the defendant, which has been read by the Master of the Rolls, but the substance of that evidence is that practically the whole of the original light was gone. I think we are also entitled to consider the case, not only by the light of the evidence, but by the admitted facts as to what alteration was in fact made, what obstruction the plaintiffs did in fact put up, and what the nature of the premises was, all of which is perfectly plain and visible to any of us who have seen the plan and studied the models, which were admitted in argument to be substantially correct; and, when all that evidence and those facts are considered, this point stands out, I think, beyond all question, that what the plaintiffs did would not have been the subject of an injunction prior to these alterations. The result, therefore, is that before these alterations on the dominant tenement the erection which the plaintiffs put up would not have been a legal interference with the rights to light of the dominant tenement; and although, as matters now stand, some light would in fact be cut off by blocking up the space which is left after the alterations which have been made by the defendant, the alterations cannot in fact affect the plaintiffs' rights, because they had that right before to block up to that extent. If once you determine the fact that the plaintiffs were entitled prior to these alterations to erect the obstruction to such a height as they did against the building in question, then, as they have done nothing beyond that which they were entitled to do, they could not now be enjoined from doing it; and it follows almost logically and as a matter of course, if they have a right to block up this gap which is left and cannot be restrained from doing it, that what the defendant has in fact done is to give up and destroy all rights that he had,

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because after what he has done he cannot claim any right at all. That being so, to my mind this appeal fails, but I prefer to base my decision on the question of fact which I have already indicated.

KENNEDY L.J. I agree with the conclusions which have been stated by both my brethren, and I adopt the construction of the judgment which is under appeal, which has been stated by the Master of the Rolls, and I think the judgment of the learned judge in the Court below ought to be affirmed.

Solicitors: *Brash Wheeler & Chambers; Lawson Lewis, Welch & Wenham.*

W. C. D

WARRINGTON J. 1907 *April* 9.

In re HAZELDINE'S TRUSTS.

[1906 H. 1282.]

Mortgage—Real Estate subject to Trust for Conversion, Mortgage of—Rents and Profits of unconverted Real Estate—Payment into Court by Trustees under Trustee Act, 1893—*Payment out—Application by Mortgagors—Terms imposed by Court—Money charged on Land—Proceeds of Sale of Land—Real Property Limitation Act*, 1833 (3 & 4 *Will.* 4, *c.* 27), *s.* 34—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8.

The only effect of s. 8 of the Real Property Limitation Act, 1874, is to bar the right of a mortgagee to bring an action to recover money charged on land after the lapse of twelve years.

Sect. 34 of the Real Property Limitation Act, 1833, which, where land is the subject-matter of a mortgage, provides for the extinguishment at the end of the period of limitation of the mortgagee's title, does not affect his title where the subject-matter of the mortgage is proceeds of the sale of land.

Kibble v. *Fairthorne*, [1895] 1 Ch. 219, discussed.

A testator, who died in 1878, by his will gave the residue of his real and personal estate to trustees upon trust to sell and convert at their discretion and to divide the proceeds among his four children in equal shares. At the date of his death the testator was possessed of a certain freehold house. The trustees, in exercise of their discretion, retained this property, and treated it as forming part of the testator's residuary trust estate. In 1889 two of the children mortgaged their interests in this property and "the proceeds thereof." In 1896 and 1905 the trustees paid into Court under the Trustee Act, 1893, certain sums representing the shares of the mortgagors in the rents and profits of this property. No part of the principal secured by the mortgage nor any interest thereon

was ever paid, nor was any acknowledgment of the right thereto ever given by the mortgagors. On an application by the mortgagors for payment out to them of the fund:—

Held, that the Court would only sanction the payment out on condition that the mortgagors satisfied the mortgagees' claim for principal and interest under their mortgage.

In re Lloyd, [1903] 1 Ch. 385, applied.

ORIGINATING SUMMONS.

George John Hazeldine, by his will dated July 24, 1874, after appointing executors and trustees thereof and giving various legacies, devised and bequeathed the residue of his real and personal estate to his trustees upon trust to convert at their discretion; and as to the moneys to arise from such conversion he declared that after payment thereout of his debts and liabilities, and also all costs, charges and expenses of and incidental to the trusts and powers thereby reposed in them, his trustees should invest the residue of the said moneys as therein mentioned, and should assign and transfer or pay or divide his net residuary trust estate between his four children Harriot Laura Hazeldine, Ethel Violette Hazeldine, Norton Fairfax Whitbourn Hazeldine, and Stanley Wellborne Hazeldine in equal shares, the shares of such children to be vested in them respectively on their respectively attaining the age of twenty-one years, and not before.

The testator died on March 15, 1878.

At the date of his death the testator was possessed of (inter alia) an estate for the life of his brother Francis Hazeldine, who was still living, in certain freehold premises known as Oaklands, situate at Godstone, in the county of Surrey, subject to a mortgage thereon created by the testator in favour of the Atlas Insurance Company. This property had not been sold, but had been retained by the trustees in the exercise of the discretion given them by the will, and had been treated by them as forming part of the testator's residuary trust estate.

N. F. W. Hazeldine attained the age of twenty-one in November, 1886, and S. W. Hazeldine attained that age in March, 1888.

By an indenture of mortgage dated October 16, 1889, N. F. W. Hazeldine and S. W. Hazeldine conveyed and assigned (as beneficial owners) to J. Edwards and H. Isaacs, carrying on business under the style of the Union Deposit Bank (inter alia),

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all and every the part shares and interests, policies of assurance, and other premises comprised in and assigned by a mortgage to the Whittington Insurance Company dated May 30, 1888, to secure the repayment of 200*l.* with interest at a very high rate. The mortgage contained the usual covenant by the mortgagors for payment of principal and interest.

The mortgage to the Whittington Insurance Company, which had since been paid off, comprised (inter alia) all the interests of N. F. W. Hazeldine and S. W. Hazeldine in the Oaklands property and in "the proceeds thereof."

N. F. W. Hazeldine and S. W. Hazeldine executed numerous other mortgages of their shares in the testator's residuary trust estate, notices of which were received by the trustees.

In July, 1896, in consequence of the numerous and conflicting claims of the various mortgagees, the trustees paid into Court under the Trustee Act, 1893, a sum of 111*l.* 0*s.* 8*d.*, representing the shares of N. F. W. and S. W. Hazeldine in the net rents and profits of Oaklands after payment thereout of the interest to the Atlas Insurance Company, to the credit of an account entitled "In the matter of the trusts affecting the shares of Norton Fairfax Whitbourn Hazeldine and Stanley Wellborne Hazeldine in the outstanding residuary estate of George John Hazeldine deceased." And in January, 1905, they paid into Court to the credit of the same account a further sum of 254*l.* 3*s.* 1*d.* in respect of the rents and profits of the same property.

The benefit of the mortgage of October 16, 1889, had been transferred to and was now vested in the Union Deposit Bank, Limited.

Neither the bank nor its predecessors in title had within twelve years of the execution of the mortgage taken any steps to enforce the mortgage, nor had any part of the principal money thereby secured or any interest thereon ever been paid, nor had any acknowledgment of any right thereto been given.

There was now in Court to the credit of the above-mentioned account a sum of 401*l.* 8*s.* 6*d.* New Consols and 1*l.* 8*s.* 6*d.* cash.

This was a summons by N. F. W. and S. W. Hazeldine asking that the fund in Court might be paid out to them in moieties.

The trustees of the will and the various incumbrancers were made respondents to the summons, but the only respondent who appeared on the hearing was the Union Deposit Bank, Limited.

C. L. Hales, for the summons. Under s. 8 of the Real Property Limitation Act, 1874 (1), the right of the mortgagee to sue on the covenant in the mortgage deed for payment is barred, as well as his remedy against the security: *Sutton* v. *Sutton* (2); *Fearnside* v. *Flint*. (3) That being so, the mortgagee's title to the land is extinguished: Real Property Limitation Act, 1833, s. 34 (4); see also *Sands* to *Thompson*. (5) The mortgage is, therefore, dead: *Kibble* v. *Fairthorne*. (6)

[WARRINGTON J. I am not so sure about that. Can you shew me any case where money in Court, which is the subject of a mortgage, has been paid out to the mortgagor except upon the terms of his satisfying the mortgage?]

The rights of the respondent bank under the mortgage are gone, and the rights of the applicants are revived. The applicants are therefore entitled to the fund in Court. There is no

(1) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57):—

"8. No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given."

(2) (1882) 22 Ch. D. 511.

(3) (1883) 22 Ch. D. 579.

(4) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27):—

"34. At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of quare impedit or other action or suit, the right and title of such person to the land, rent, or advowson, for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished."

(5) (1883) 22 Ch. D. 614

(6) [1895] 1 Ch. 219.

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one now who can resist their claim. It was unnecessary, therefore, to serve the respondent bank with the summons, as it has no longer any right to object to payment out of the fund to the applicants. The applicants rely on s. 8 of the Act of 1874.

[WARRINGTON J. That section merely shews that no action can be brought by the mortgagee upon the mortgage.]

The effect of s. 34 of the Act of 1833 in barring the title of the bank is to re-vest the mortgaged property in the applicants, and this view is supported by the cases referred to. *In re Lloyd* (1), in which the Court held that the mortgagors there were entitled to have the fund in Court paid out to them only on the terms of their paying the whole of the arrears of interest due on the mortgage, was the case of a mortgage of a reversionary interest, to which the Statutes of Limitation have no application. There the mortgage was alive; here it is dead.

Edward Beaumont, for the respondent bank. I admit that the right of the bank to sue on the personal covenant in the mortgage is barred by s. 8 of the Act of 1874: *Kirkland* v. *Peatfield* (2); but I submit that the charge thereby created continues. Under the will the property in question was subject to a trust for conversion. The subject-matter, therefore, of the mortgage was not land, but the proceeds of the sale of land. Sect. 34 of the Act of 1833 has, therefore, no application to the present case. It applies only to a case where the mortgagor has been in quiet possession of the land. *Kibble* v. *Fairthorne* (3) was the case of a mortgage of land, and therefore does not apply.

[WARRINGTON J. Is not *Kibble* v. *Fairthorne* (3) in your favour when properly considered?]

It is clear there that Romer J. did not consider that s. 34 applied to the subsequent sections of the Act. The case was decided by him on s. 34, and that section does not, it is submitted, apply to a charge on the proceeds of the sale of land. I rely upon the principle that he who seeks equity must do equity. That principle was applied in *In re Lloyd* (1) in somewhat analogous circumstances. Applying that principle in the

(1) [1903] 1 Ch. 385. (2) [1903] 1 K. B. 756.
(3) [1895] 1 Ch. 219.

present case, it is submitted that the fund in Court ought not to be paid out to the applicants except upon the terms of their paying the 200*l.* secured by the mortgage, with such reasonable interest as the Court shall allow.

[He also referred to *Lloyd's Bank* v. *Pearson* (1); Conveyancing and Law of Property Act, 1881, s. 22, and note thereon in Carson's Real Property Statutes, p. 579, citing *Hockey* v. *Western*. (2)]

C. L. Hales, in reply.

Warrington J., after stating the facts and observing that the subject-matter he had to deal with was not land, but the proceeds of the sale of land, continued:—It is undisputed that under s. 8 of the Real Property Limitation Act, 1874, no action or other proceeding can now be brought to recover the money secured by the mortgage, and that is not, therefore, the point I have to determine. The trustees have paid into Court certain moneys in their hands, representing, in fact, income of a portion of the estate of the testator consisting of certain freehold premises held by him pur autre vie. The applicants come here and ask to have those moneys paid out to them. The respondent bank contends that the applicants are not entitled to have them paid out to them unless they do what is equitable, namely, pay the money which was advanced by the respondent bank, with interest—not the full interest stipulated for by the mortgage deed, but interest at such a reasonable rate as the Court shall direct. The question I have to determine, therefore, is whether that contention is right. I think the whole question turns on whether or not, as counsel for the applicants contends, the mortgage is, by virtue of the Act of 1874, dead. If it is dead, then of course the respondent bank can set up no right under it. If it is not dead, then, although the bank may not be entitled to bring an action to enforce it, it may be entitled to say that the Court ought not, on the application of the mortgagors, to deal with the fund over which it has control, except on condition that the applicants satisfy the claims of the bank, as in *In re Lloyd* (3), to which I will presently refer.

(1) [1901] 1 Ch. 865. (2) [1898] 1 Ch. 350.
(3) [1903] 1 Ch. 385.

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[His Lordship then read the material provisions of s. 8 of the Act of 1874, and continued:—] At first sight it would appear plain that all that that section does is to bar the remedy of the mortgagee by action, but not otherwise to affect his right to the money charged upon and payable out of the land. That that is the true construction of the section taken by itself is, in my opinion, borne out by *In re Lloyd.* (1) It is true that the decision in that case turned, not on s. 8 of the Act of 1874, which reproduces s. 40 of the Real Property Limitation Act, 1833, but on s. 42 of the latter Act; but for the purposes for which I am considering that case I do not think that is of any importance. The decision there was this: Under s. 42 of the Act of 1833 no more than six years' arrears of interest can be recovered by a mortgagee; but, notwithstanding that, it was held that, where a mortgagor asks to have a fund in Court, which is subject to a mortgage, paid out to him, he can only have it paid out to him on the terms of his paying the mortgage debt, and not only six years' but the whole of the arrears of interest. In other words, the case decided that s. 42 does not deprive the mortgagee of his right to the interest in excess of the six years, but only bars his right to recover it himself by any action he may bring. And, if the judgment of Stirling L.J. in the Court of Appeal be looked at, it will be seen that that is the effect of the decision. If that be so, it seems to me that, subject to one point to which I shall presently have to refer, that decision is in point in the present case.

The words of s. 42 of the Act of 1833 are: "No arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent." The words of s. 8 of the Act of 1874 are: "No action or suit or other proceeding shall be brought to recover any sum of money

(1) [1903] 1 Ch. 385.

secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same." It seems to me that substantially there is no difference between the two sections, and that, if it be held that s. 42 does not prevent a mortgagee from saying that the application of the mortgagor ought not to be acceded to except upon payment of the whole of the arrears of interest, it would follow that I must on the same principle hold that a mortgagor cannot recover the fund charged by the mortgage without satisfying the mortgage, and that notwithstanding s. 8 of the Act of 1874, which has nothing to do with an application by the mortgagor.

That does not, however, dispose of the whole case, because it is contended on behalf of the mortgagors that if an action upon the mortgage is barred by s. 8 of the Act of 1874 the mortgage itself is gone altogether, and for this purpose reliance is placed on s. 34 of the Real Property Limitation Act, 1833. [His Lordship read the section, and continued:—] In the first place, it seems to me that s. 34, on the face of it, has nothing to do with s. 40. Sect. 8 of the Act of 1874, which re-enacts s. 40 of the Act of 1833, does not deal with actions to recover land at all, nor does it have anything to do with actions for enforcing rights to land. All it deals with is money charged upon land. All that s. 34 does is to extinguish the rights of persons in whose favour land is charged to bring actions to recover the land. It seems to me that if there were no authority on the construction of s. 34 it would be plain that that section refers to that part of the Act which precedes it, and which deals with actions for the recovery of land, and not with that part of the Act which succeeds it, and which deals with a different subject-matter. But it also seems to me that the case of *Kibble* v. *Fairthorne* (1), referred to by counsel for the applicants as an authority for the proposition that the mortgage is dead, is not an authority in his favour when rightly understood. The headnote to that case is this: "Sect. 34 of 3 & 4 Will. 4, c. 27, which provides that at the determination of the statutory period of

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limitation for bringing an action 'the right and title' to the land shall be extinguished, applies as between a mortgagee and a mortgagor in possession, and in favour of the latter, although a prior mortgage has been in existence during the earlier part of such statutory period." Obviously the reference there is not to the recovery of money at all, but to the recovery of the estate in the land which a mortgage gives. The mortgagee, by virtue of the mortgage, obtains a certain estate in the land. By s. 34 that estate is extinguished, and therefore the mortgagor's estate remains intact. That that is really the meaning of the case is made plain by Romer J.'s judgment. The learned judge points out that (1) "A mortgagee has two remedies: one being against the land comprised in his mortgage, and the other against the mortgagor personally, to recover the moneys secured; and as regards these two classes of remedies there are in the Statutes of Limitations two distinct sets of provisions. Take the Act 3 & 4 Will. 4, c. 27, and it will be found that there are two sets of enactments, one dealing with rights against the land, and the other with personal remedies. These two sets of enactments stand on an entirely different footing. As to the land, it is provided that when the statutory limitation operates, not only is the remedy against the land barred, but the mortgagee's interest in it is extinguished. In the second set of provisions—those relating to personal remedies—the statutory limitation has a different effect. There only the remedy is barred, the debt itself not being extinguished." It seems to me, therefore, that, so far from that case being an authority in favour of the contention put forward in this case that the mortgage is dead—that is, in the sense that the mortgagees cannot set it up as against the claim of the mortgagors—it is, if anything, rather an authority the other way, because Romer J. draws a distinction between the two sets of provisions, viz., those relating to the estate in the land, as to which s. 34 applies, and those relating to the right of a mortgagee to the money charged on the land.

In my judgment, therefore, the present case comes within the principle of *In re Lloyd* (2), and the present applicants are not entitled to have the fund in Court paid out to them except upon

(1) [1895] 1 Ch. 224. (2) [1903] 1 Ch. 385.

the condition of doing that which is equitable. And I think I should be right in saying that they would be doing that which is equitable by paying the principal debt, with interest at 5 per cent. from the date of the mortgage. There must be a declaration, therefore, that the applicants are not entitled to have the fund paid out to them except upon the terms of their paying the 200*l.*, with interest at 5 per cent. from the date of the mortgage.

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Solicitors: *W. H. Hales; Hicks, Arnold & Mozley.*

W. I. C.

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[1907 A. 183.]

Vendor and Purchaser — Settlement — Real Estate — Equitable Limitations — Power of Appointment — Trustees directed to Pay and Transfer the Property to Appointees—Power of Sale—Appointment by Will upon Trust for Sale—Sale by Trustees of Will—Conflict between Two Sets of Trustees —Outstanding Legal Estate—Deduction of Title.

By a marriage settlement real estate was conveyed to trustees upon trust after the death of the survivor of the husband and wife "to pay and transfer the said hereditaments and premises" to the children of the marriage as the survivor of the husband and wife should appoint. The settlement contained powers for the trustees to sell the property during the lives of the husband and wife and the survivor and during the lifetime of any child. The husband survived his wife, and by his will appointed the property to trustees on trust for sale and conversion, and directed them to stand possessed of the proceeds upon a series of complicated trusts for the benefit of his children. The trustees of the will, purporting to act under the trust for sale therein contained, contracted to sell the property. The purchaser took the objection that the proper persons to sell were the representatives of the last surviving trustee of the settlement:—

Held, that, inasmuch as the trustees of the settlement were directed to "pay and transfer" the property to the appointees, the trust for sale by the trustees of the will was expressly authorized by the terms of the power and overrode the powers of sale contained in the settlement; the trustees of the will were therefore the proper persons to sell the property and could call for a conveyance of the legal estate.

The 14th condition of sale provided that every deed or instrument which should be necessary for getting in any outstanding estate or interest or for completing the vendors' title should be prepared by and at the expense of the purchaser, who should also bear the expense of the doing

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of every act needed for perfecting the assurance by all parties other than the vendors :—

Held, that this condition did not relieve the vendors from the expense of deducing the title to the outstanding legal estate.

ADJOURNED SUMMONS.

The question raised in this case was whether the trustees of the will of Mr. S. W. Adams could make a good title to certain freehold property known as Rull Farm, in Devonshire.

By a settlement of April 20, 1852, in consideration of the then intended marriage between Mr. S. W. Adams and Miss Vinicombe, Rull Farm was conveyed in fee to two trustees, W. H. Besby and J. P. Sydenham, To hold the same unto the said W. H. Besby and J. P. Sydenham and their heirs To the use of the said W. H. Besby and J. P. Sydenham their heirs and assigns upon the trusts therein declared That was to say Upon trust for the said E. R. Vinicombe and her heirs until her marriage, and then upon trust to pay the rents and profits to her during the joint lives of herself and the said S. W. Adams, and then to the survivor of them for his or her life; and from and after the decease of the survivor of them the said S. W. Adams and E. R. Vinicombe Upon trust to pay and transfer the said hereditaments and premises to all and every or any one or more exclusive of the other or others of the children or more remote issue of the said intended marriage the more remote issue to be born within the period prescribed by law for preventing perpetuities and to be at such days and times and in such shares and proportions and subject to such conditions charges and limitations over in favour of any other of such children or more remote issue as they the said S. W. Adams and E. R. Vinicombe at any time or times during their lives . . . . should jointly direct or appoint and for want of such direction or appointment and subject thereto then as the survivor of them the said S. W. Adams and E. R. Vinicombe by any deed or deeds . . . . or by his or her last will and testament . . . . should direct or appoint And in default of and subject to such appointment upon the trusts therein set out.

The settlement contained a power for the trustees to sell the property with the consent of Mr. and Mrs. Adams and the

survivor of them, and another power for them to sell it after the death of the survivor during the lifetime of any child of the marriage.

The marriage was shortly afterwards solemnized, and Mrs. Adams died in 1897. Mr. S. W. Adams made his will on March 15, 1899, and thereby, after appointing executors and trustees and reciting the settlement, did limit and appoint all the property which at, on, or at any time after his death should be or become comprised in or subject to the trusts of the settlement, all of which property and the moneys and investments for the time being representing the same were thereinafter referred to as "the settled property," unto and to the use of his trustees, their heirs, executors, administrators and assignees respectively, in trust to sell or otherwise convert the same into money and to invest the net moneys arising thereby in their names, and to stand possessed of "the settled property" upon a series of complicated trusts in favour of the issue of the marriage.

Mr. Adams died in May, 1904. Both the trustees of the settlement were dead, and no successors to them had been appointed.

On November 2, 1906, the trustees of the will, purporting to act under the trust for sale therein contained, contracted to sell Rull Farm to the purchaser Mr. J. O. Frost. The contract was in the ordinary form on a sale of freeholds, and was subject to conditions, of which the 14th was as follows:—

"The purchaser shall, on the completion day, at the office of the vendors' solicitor, pay the remainder of his purchase-money, and upon such payment shall be entitled to a proper assurance of the property, executed by the vendors and all other necessary parties (if any). Such assurance and every other deed or instrument which shall be necessary for getting in or surrendering any outstanding estate, term, or interest, or for completing the vendors' title, shall be prepared by and at the expense of the purchaser, who shall also bear the expense of the perusal, approval and execution of every such instrument by, and of the doing of every act needed for perfecting the assurance by all parties other than the vendors and any mortgagee to whose mortgage the vendors' title is subject. . . . ."

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The purchaser took the objection that the legal estate was vested in the trustees of the settlement or their representatives, and that they were the proper persons to sell the property; and, after some correspondence, he took out this summons asking for a declaration that a good title had not been shewn and that he was entitled to a return of his deposit.

F. T. Duka, for the summons. The purchaser is willing to complete, but he desires to have a good title, and he submits that the trustees of the settlement ought to be the vendors instead of the trustees of the will. It is clear that the original settlors intended that the management of the estate should remain in the hands of the trustees of the settlement.

[He was stopped by the Court.]

Charles Bathurst, for the vendors. We have power under the settlement and the will to sell the property. The appointment was a good exercise of the power, and was not invalidated by the interposition of trustees for sale. That has been decided in *Kenworthy* v. *Bate* (1), where the limitations were legal, and in *In re Redgate* (2), where they were equitable. Therefore we have power to sell the property, and the words "pay and transfer" in the settlement shew that we were intended to have that power. We do not go so far as to say that we are the only persons who can convey it, but that we have power to do so, and, in the absence of any trustees of the settlement, are the proper persons to do so. We have been unable to find the representatives of the surviving trustee of the settlement, and an application will have to be made to the Court under s. 26, sub-s. v., of the Trustee Act, 1893. The trustees of the settlement have only the bare legal estate. The expense of getting in that outstanding legal estate and of deducing the title to the legal estate is thrown upon the purchaser by condition 14: *Official Manager of Sheerness Waterworks Co.* v. *Polson*. (3)

F. T. Duka, in reply. We do not dispute the validity of the appointment, but we submit that *In re Redgate* (2) does not apply further than that. In that case the only question was whether

(1) (1802) 6 Ves. 793. (2) [1903] 1 Ch. 356.
(3) (1861) 3 D. F. & J. 36.

the land had been converted into personalty; there was only one power of sale, viz., that created by the appointment: the beneficiaries were absolutely entitled, and the trustee only had to divide the proceeds of sale between them. Here there are two sets of trustees, both of whom have power to sell, and the trusts of the proceeds of sale are not simply for division, but are a complicated series of provisions, for the careful carrying out of which the trustees of the settlement are responsible. They alone can give a receipt for the purchase-money. In *Kenworthy* v. *Bate* (1) the legal estate was not vested in trustees, so there was no question of this kind. The trustees of this settlement are not bare trustees; they would not be justified in handing over the property to the trustees of the will: *Scotney* v. *Lomer* (2); *Busk* v. *Aldam.* (3) Mr. Adams had no power to appoint the legal estate or divest the trustees of their duties. The Court will assume that the settlors intended the property to remain in the custody of the persons to whom they had entrusted it until some beneficiary absolutely entitled was ready to receive it: Farwell on Powers, 2nd ed. p. 326. That is shewn by the words "pay and transfer." The costs of deducing the title to the legal estate are not thrown upon the purchaser by condition 14.

[WARRINGTON J. I need not trouble you on that point.]

The trustees of the settlement were well-known gentlemen, and there will be no difficulty in finding their representatives.

WARRINGTON J. stated the facts, and continued:—Now, purporting to exercise the trust for sale contained in the will, the trustees have entered into the present contract, and the question is whether they can make a title. This is one of those cases which are peculiarly the subject of authority, and two cases have been cited which seem to me to be directly in point, one of them being the supplement of the other. Those two cases are *Kenworthy* v. *Bate* (1) and *In re Redgate* (4), a modern case. In *Kenworthy* v. *Bate* (1) the head-note is this: "Power of appointing real estate well executed by a devise to trustees to sell, and an appointment of the money produced by the sale." In that case the limitations

(1) 6 Ves. 793.
(2) (1886) 31 Ch. D. 380.
(3) (1874) L. R. 19 Eq. 16.
(4) [1903] 1 Ch. 356.

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of the settlement were legal limitations; that is to say, the property was conveyed to trustees and their heirs to certain uses in favour of the beneficiaries, and the power was expressed in these terms: "To the use of such child or children of the said Bartholomew Penny on the body of said Ann his wife begotten or to be begotten as the said Bartholomew Penny should in and by his last will and testament in writing under his hand and seal duly executed, give, direct, limit, and appoint," and for want of such direction to their sons successively in tail. In terms, therefore, all that the donee of the power of appointment there had was a power to limit the use to such children or child as he should desire. He survived his wife and died in 1798, having had three sons and two daughters, besides some who had died. He made his will, in which he recited the settlement, and then he gave, devised and bequeathed all the estates so settled, and all the rest and residue of his estates, real and personal, to two trustees to sell and dispose of the estates, and the net produce was to be divided among his children. One of the sons, who by the death or presumed death without issue of his elder brother, who had become entitled to the first estate in tail male under the limitations of the original settlement, became bankrupt, and an action was brought by his assignees insisting that the appointment purporting to be effected by the will of Bartholomew Penny was void, and that the estates had become vested in the bankrupt. The matter came before the Master of the Rolls, Sir William Grant, and he examined certain authorities, amongst others one of *Roberts* v. *Dixall* (1), in which it was held that a power to appoint land was well executed by a charge; and he further examined another case to the same effect, namely, *Long* v. *Long* (2), and concluded his judgment in these terms (3): "Then, does not a power to give include a power to sell for the purpose of giving the money instead of the land? It is impossible not to collect from these cases a principle that will bear out what is contended by the defendants, though the case has not precisely occurred in terms." It is quite plain that, although *Kenworthy* v. *Bate* (4) was not a decision between vendor and purchaser, the

(1) (1738) 2 Eq. Ca. Ab. 668.
(2) (1800) 5 Ves. 445.
(3) 6 Ves. 797.
(4) 6 Ves. 793.

Master of the Rolls could not have come to the conclusion which he did arrive at without having at the same time determined that the appointment contained in the will of Bartholomew Penny would have, on the trust for sale being executed, enabled the trustees to limit the use to the purchasers; otherwise it would be absurd, because the children took nothing but money under his will. I think the inevitable conclusion to be drawn from that judgment is that the will, coupled with a sale by the trustees under their power, would have been an effectual limitation of the use to the purchaser under those trusts.

Now *Kenworthy* v. *Bate* (1) was, as I have already said, a case in which the estates limited were legal, and the question involved was whether a sale by the trustees would amount to, or could be carried into effect by, a limitation of the use; but in *In re Redgate* (2), which is a much more modern case before Buckley J., the estates were equitable, as they are in the present case, and, except for certain verbal differences in the terms in which the power of appointment was expressed, the case seems to me to be very like the one I am now dealing with. In *In re Redgate* (2) the property in question was comprised in a settlement of 1834, and it was limited by that settlement unto and to the use of two trustees; that is to say, the legal estate was limited to the trustees, upon trust as to one moiety, "to convey and assure the same unto such one or more child or children or issue of the body of the said Elizabeth Redgate, and for such estate or estates, manner and form as the said Elizabeth Redgate shall, in and by her last will and testament in writing," and so on, "give, devise, or dispose of the same." Elizabeth Redgate made her will in 1868, and by that will, by virtue of the power, appointed all her real estate and every other estate over which she had any control to John Ashwell, his heirs and assigns, upon trust to receive the rents and to hold the same upon trust for her two grandchildren in equal moieties when they should attain twenty-one, and after the youngest should attain twenty-one: "Then I direct my said trustee, his executors or administrators, to forthwith dispose of my said real estate either together or in parcels," and to hold the proceeds and divide them between the

(1) 6 Ves. 793. (2) [1903] 1 Ch. 356.

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two grandchildren. The question there was whether the property had been by the will of Elizabeth Redgate converted into personal estate under the equitable doctrine of conversion. Buckley J. examined the authorities, including *Kenworthy* v. *Bate* (1), in which he especially referred to that passage in the judgment of Sir William Grant which I have already read; and he came to the conclusion that in the case before him the power was well executed, and that the land had been effectually converted into personalty. After coming to that conclusion he concludes by saying this (2): "Then I am told that this cannot be so in this case, because the trustees of the will have not got the legal estate and cannot effect a sale of the land, but must go to the original trustee in whom the legal estate is vested. I do not see that that creates any difficulty. If the trustee for sale executes the trust, he can carry out the sale and can call upon the trustees of the deed to convey the legal estate to the purchaser. The case is, I think, covered by the principle of *Kenworthy* v. *Bate* (1), and the trustees of the deed are bound, if called upon, to convey the legal estate in accordance with the appointment." If that decision is applicable to the present case, it is directly in point, not only as to the validity of the appointment, but on the question whether the vendors can call upon the trustees of the original deed to convey the property to them. It has been sought to distinguish that case from the present, first, by reason of the fact that the will of Mr. Adams contains extremely elaborate provisions for his issue. In my opinion that is utterly irrelevant. It makes no difference at all what are the trusts of the proceeds of the sale directed by the will of the donee of the power. The question is, Had he power to make the appointment in the form in which he made it? It seems to me, therefore, that that argument cannot prevail.

But an argument in which there was a good deal more weight was based on the fact which I have mentioned, that the original settlement contained a power for the trustees to sell, which was not the case in *In re Redgate*. (3) Therefore it is said there

(1) 6 Ves. 793. (2) [1903] 1 Ch. 361.
(3) [1903] 1 Ch. 356.

is a conflict of powers between the trustees of that settlement and the trustees of the will, and that the proper persons to sell are the trustees of the original settlement. Now I think that is completely answered by the terms in which the power is limited. It must be remembered that the property was freehold. The terms upon which the power is limited are, upon trust "to pay and transfer the said hereditaments and premises to" the children at such times and in such shares and proportions as the donees of the power shall appoint. Now payment cannot be carried out except by a sale, and it seems to me that the donee of this power had under its express terms a right to say whether the property should be paid or whether it should be transferred. He could, if he liked, have directed that the trustees should transfer the property to the children; he could, if he liked, have directed them to pay it. The only way in which he could direct freehold estate to be paid would be by creating a trust for sale. It seems to me, therefore, that the creation of the trust for sale in this case is expressly authorized by the terms of the power. If that is so, then that power overrides the power of sale contained in the settlement. The donee had a right to direct that for the purpose of carrying the provisions of the settlement into effect the property should be sold; and he had, in my opinion, on the authorities, a right to direct that it should be sold by the trustees of his own will. They have, therefore, properly entered into the contract for sale, and I must refuse the purchaser's summons, which asks for a declaration that the requisitions have not been sufficiently answered and a good title cannot be made.

There is one other question which has been raised, and I must not part with the case without mentioning it. The vendors claim that the expense of deducing title to the legal estate should fall on the purchaser. They rely upon the 14th condition, but in my opinion that condition does not help them in this respect. I think under this contract it is the duty of the vendors to deduce the title to the legal estate. When that title has been deduced the question of the expense of getting in the legal estate and of the conveyance will arise, and then it may be that the 14th condition will apply; but, so far as deducing title is

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concerned, I think it is as much the duty of the vendors to deduce title to the legal estate as it is their duty to deduce it to the equitable estate. I think, therefore, in that respect the contention of the vendors must fail.

Of course this is only a vendor and purchaser summons. It is not specific performance, and I say nothing about how the contract is to be carried into effect. I only deal with the point whether the vendors, as trustees of the will of S. W. Adams, can make a title. I hold that they can, and there must be a declaration to that effect, coupled with a declaration that it is the duty of the vendors to deduce the title to the legal estate; but I think the summons has substantially failed, and therefore the purchaser must pay the costs.

Solicitors: *G. E. Cockram, for Partridge & Cockram, Tiverton; Prideaux & Sons, for Andrews & Pode, Modbury.*

H. C. R.

NEVILLE J.
1907
March 6, 7, 8, 9, 11.

CORSELLIS *v.* LONDON COUNTY COUNCIL.

[1906 C. 1747.]

Highway—Footway—Adjoining Strip of Land in Lease—Whether Termor can dedicate—Presumption as to Freeholder's Assent—User of Sub-tenants inconsistent with Dedication.

In April, 1883, a freeholder demised building land to C. for a term of eighty-two years, and C. contracted with L. to erect a number of shops on a part of the land that fronted a highway. The plans submitted by L. to the local authority shewed that the proposed building line of the shops left a strip of land, three feet in width, between the front wall of the shops and the public footway. The local authority informed L. that his plans were approved subject to the strip of land being given up to form part of the public footway. L., without replying, commenced to build, and, on completing the shops in September, 1883, applied to the local authority to pave the footway in front of his shops right up to the building line. They replied that, on the strip of land being given up as above stated, the footway would be paved. L. did not reply, but allowed them to pave the strip of land right up to the wall of the shops, no line of demarcation being made separating it from the footway. In the meantime C., who had no knowledge of L.'s communications with the local authority, had granted L. separate underleases of the shops for eighty years, and had also assigned to him for value the head lease. In 1898

C. repurchased the head lease for value from L.'s successors in title, and in 1904 the freeholder died. In an action by C. and the assignees for value of some of the underleases to restrain the defendants from taking up the pavement of the strip of land, on the ground that it was private property, the defendants justified their acts on the ground, amongst others, that the strip of land had been dedicated to the use of the public since 1883, and was part of the public footway :—

Held, that there had been no dedication to the public, for that under the circumstances the consent of the freeholder could not be presumed.

Held, also, that the continuous user of the paved strip by the under tenants of the shops for the purpose of exhibiting their goods for sale rebutted dedication.

Held, also, that L. could not dedicate for the term of the head lease, dedication for a term being unknown to the law of England; it must be in perpetuity.

Dictum of Byles J. on this point in *Dawes* v. *Hawkins*, (1860) 8 C. B. (N.S.) 848, 858, adopted.

ACTION.

This was an action for an injunction to restrain an alleged trespass, and for damages, under these circumstances.

By deed dated April 18, 1883, J. Watney (the freeholder) demised a piece of land fronting York Road, in the borough of Wandsworth, to the plaintiff Corsellis for eighty-two years from March 25, 1883, and Corsellis covenanted to build thereon a number of houses and shops, and not to do or suffer to be done on any part of the demised premises any act or thing which might be or grow to the injury of the lessor, and at the expiration of the term to deliver up the land and premises to the lessor. By a building agreement dated April 19, 1883, one Lewry agreed with Corsellis to erect fifteen houses with shops on part of the land fronting York Road. In the meantime Lewry had submitted plans of the intended shops to the then local authority, which shewed that the building line of the intended shops was measured twenty-three feet from the centre of the road, and left a strip of land, three feet in width, lying between the wall of the intended shops and the public footpath of the road; and on April 4, 1883, the local authority passed a resolution consenting to the plans subject to "the strip of ground, three feet in width, between the proposed shops and the public way being given up to form part of such public way before building operations are commenced." Notice of this resolution was sent by letter to Lewry on April 6. He did not reply, but commenced to build,

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and on the following September 25, when the buildings were completed, he wrote the surveyor of the local authority as follows: "I shall feel greatly obliged if you can arrange for the paving to be done in front of my shops close up to the building line, as I think it would make the appearance of the street much better." On October 3, 1883, the local authority passed a resolution that, upon the ground separating the new shops in York Road from the public way being given up to form part of such public way, the footway be paved at an estimated cost of 71*l.* 7*s.* Notice of this resolution was sent by letter to Lewry on October 5. He did not reply, but allowed the local authority to pave the strip of land, as though it were part of the public footway, right up to the front wall of the shops. There was no physical division or line of demarcation between the paved strip of land and the public footway or pavement, except that Lewry had constructed in the strip of land, flush with the pavement and in front of each shop, a grating about 2 ft. 6 in. in width by 3 ft. 9 in. in length communicating with a cellar under each shop. Meanwhile Corsellis had granted to Lewry separate underleases of the fifteen shops, including this strip of land three feet in width (hereafter called the forecourts). These underleases were all dated September 29, 1883, and were all similar in form and for a term of eighty years from March 25, 1883, and contained covenants similar to those in the head lease of April 18, 1883. On October 3, 1883, Lewry purchased and took an assignment of the head lease from Corsellis subject to the fifteen underleases and with a declaration against merger, and on October 4, 1883, he mortgaged the head lease to one Nind. In 1885 Nind purchased from Lewry the equity of redemption in the head lease, and in 1898 Corsellis purchased for value the head lease from Nind's successors in title.

In 1883 there was a tram line running along York Road in front of the fifteen shops, and in 1906 the London County Council, purporting to act under the powers of their special Acts of 1900 and 1901, and with the written consent of the local authority, took up the pavement in front of the fifteen shops, including the forecourts, with the object of widening the road and reducing the width of the footway or pavement. Thereupon

Corsellis and the assignees for value of five of the underleases brought this action against the council, alleging that they were purchasers for value without notice of any dedication of the forecourts to the public, that the acts of the council were a trespass, and also ultra vires their special Acts, and claiming (1.) a declaration that the strip of land, three feet in width, immediately in front of the fifteen shops was private property and had not been dedicated to the public as a highway; (2.) an injunction to restrain the council from trespassing thereon; and (3.) damages for the trespass.

The council by their defence pleaded that the forecourts had been dedicated to the use of the public since 1883, and had ever since been vested in the local authority; and that the acts complained of were done with the written consent of the local authority and in furtherance of a scheme authorized by their special Acts, but this last point turned on the construction of the special Acts, and does not call for a report.

It appeared that Corsellis had acted as solicitor for Lewry in 1883, and was acquainted with his building plans and the proposed building line, but had no knowledge or notice, until 1906, of the communications that had passed between Lewry and the local authority. There was also evidence that the tenants of the shops had since 1883 continuously used the forecourts for their advertisement boards and to exhibit their goods for sale.

The original freeholder, J. Watney, lived in the neighbourhood of Wandsworth, and died in 1904. The present freeholder was not a party to the action.

Peterson, K.C., and *C. E. Allan*, for the plaintiffs. The local authority, on approving Lewry's plans in 1883, had no power to impose on him the condition that the forecourts should be given up to the public: *Reg.* v. *Tynemouth Rural Council.* (1)

[*Jenkins, K.C.*, for the defendants. Our case does not turn on that point.]

Then, assuming an agreement or an intention by Lewry to dedicate the forecourts, he could not dedicate in perpetuity without the consent of the freeholder and of Nind: *Wood* v. *Veal* (2);

(1) [1896] 2 Q. B. 451. (2) (1822) 5 B. & Al. 454.

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nor could he dedicate for his term without the consent of Nind, who had the legal estate of the head lease, but in *Dawes* v. *Hawkins* (1) Byles J. says: "It is clear that there can be no dedication of a way to the public for a limited time, certain or uncertain. If dedicated at all, it must be dedicated in perpetuity." Again, acts of user by the public will not bind the freeholder unless he is aware of them; there must be some evidence of an animus dedicandi on his part, and in the present case there is no evidence of any consent by him: *Bright* v. *Walker* (2); *Davies* v. *Stephens* (3); *Barraclough* v. *Johnson* (4); *Poole* v. *Huskinson* (5); *Piggott* v. *Goldstraw* (6); *Winterbottom* v. *Lord Derby* (7); *Attorney-General* v. *Biphosphated Guano Co.* (8); *Simpson* v. *Attorney-General.* (9) Even if there was an agreement by Lewry to dedicate, which was binding upon him, all the plaintiffs are purchasers for value without notice of it, and are not affected by it: *Attorney-General* v. *Biphosphated Guano Co.* (8) Further, the user of the forecourts by the tenants of the shops for the purposes of their business has been absolutely inconsistent with there having been any dedication to the public, and negatives it.

Jenkins, K.C., and *J. Tanner*, for the defendants. No case has yet laid down that land in lease cannot be dedicated to the public without the consent of the lessee and lessor, and no case has yet decided that the consent of the lessor cannot be presumed. In *Wood* v. *Veal* (10) the term had expired and the freeholder was the plaintiff, and it is no authority for saying that there cannot be dedication for a term. It only decides that there cannot be dedication by a lessee so as to bind the fee simple without the consent of the freeholder. The observation of Byles J. in *Dawes* v. *Hawkins* (1) was a mere dictum, and was not necessary for the question then before the Court, and it is submitted that the comment on that dictum in *Attorney-General* v. *Biphosphated Guano Co.* (11) is sound. Admitting that there must be some

(1) 8 C. B. (N.S.) 848, 858.
(2) (1834) 1 C. M. & R. 211, 221.
(3) (1836) 7 C. & P. 570.
(4) (1838) 8 Ad. & E. 99, 103.
(5) (1843) 11 M. & W. 827, 830.
(6) (1901) 84 L. T. 94.
(7) (1867) L. R. 2 Ex. 316.
(8) (1879) 11 Ch. D. 327.
(9) [1904] A. C. 476, 493.
(10) 5 B. & Al. 454.
(11) 11 Ch. D. 335.

evidence of the animus dedicandi by the owner, *Rex* v. *Barr* (1) shews that an owner who has notice of the user of the public may be presumed to have dedicated, and in *Simpson* v. *Attorney-General* (2) Lord Davey says that a lessee can make a valid dedication with the acquiescence of his lessor, and that such acquiescence may under circumstances be presumed. There can be a qualified dedication to the public: *Mercer* v. *Woodgate* (3); *Fisher* v. *Prowse* (4); and it is submitted that there was in 1883 a dedication of the forecourts to the public as part of the public footway, subject to a right in the tenants of the shops to enjoy the gratings, and that, having regard to the length of time that has elapsed and other circumstances, the consent of the freeholder who died in 1904 may be presumed. But if we are wrong on this point, then we contend that there was a clear dedication of the forecourts by Lewry for the term of the head lease, binding on him and those claiming under him, and therefore the question of purchasers for value is immaterial; and such a dedication could be made subject to the right of the tenants to expose their goods thereon for sale: *Morant* v. *Chamberlin*. (5) The question whether a lessee can dedicate, at least as against himself and his assignees, a highway to the public was raised in *Attorney-General* v. *Biphosphated Guano Co.* (6), and left open by the Court of Appeal. There Thesiger L.J., after stating the proposition and that it was a question of evidence, went on to consider the evidence and held it was insufficient in that case. There is therefore nothing, in principle, binding on this Court to hold that there cannot be dedication to the public for a term. Here the evidence shews conclusively an animus dedicandi by Lewry for the term. If he had been the freeholder it would have been a clear case of dedication. Why should not the public have the same right against the owner of the term as they would have had against the freeholder under the same circumstances? On principle there is no reason why the same rule should not be applied against a termor that is applied against a freeholder. [*In re Nisbet and Pott's*

(1) (1814) 4 Camp. 16.
(2) [1904] A. C. 476, 507.
(3) (1869) L. R. 5 Q. B. 26.
(4) (1862) 2 B. & S. 770.
(5) (1861) 6 H. & N. 541.
(6) 11 Ch. D. 327, 338.

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Contract (1) and Pratt on Highways, 15th ed. pp. 26, 30-40, were also referred to.]

Peterson, K.C., in reply.

NEVILLE J. This action raises two main issues. The first is with regard to the forecourts in front of the fifteen houses in York Road, Wandsworth, and the question is whether they are the private property of the owners of the houses, or whether the public have rights in them. The title to the forecourts, or strip of three feet, is in the plaintiffs. The question, therefore, resolves itself into whether there has been dedication, or anything equivalent to dedication, to the public. The original freeholder, by whom the head lease was granted, is dead, and the present freeholder is not a party to the action. The head lease was originally granted for a term of eighty-two years to the plaintiff Corsellis, and he afterwards assigned that lease to a Mr. Lewry, who was a builder. Mr. Lewry proposed to erect fifteen houses on the land, and he submitted, in the ordinary way, plans to the local authority. The plans shew, or at any rate the letter that accompanied the plans shews, that a distance of twenty-three feet from the centre of the roadway had been selected as the line of the actual building by Mr. Lewry. This would give a strip of three feet between the statutory width of the road and the face of the buildings themselves. With regard to this strip certain communications passed between Mr. Lewry and the local authority; and on April 4, 1883, the committee of the local authority report and a resolution was passed, and the same day the clerk of the local authority wrote Mr. Lewry, "The notice of your intention to erect fifteen shops in York Road, Wandsworth, has been laid before the board," and then he says they consent, "the strip of ground, three feet in width, between the proposed shops and the public way, being given up to form part of such public way before building operations are commenced." No answer was made by Lewry to that letter, but the houses were built, and on the following September 25 Mr. Lewry writes to the surveyor of the board, "I shall feel greatly obliged if you can arrange for the paving to be done in front of my shops

(1) [1906] 1 Ch. 386.

close up to the building line, as I think it would make the appearance of the street much better. However, I must leave this entirely in your hands to do as you please, trusting this will meet with your approval." Then there is a board meeting on October 3, when it was resolved that, "upon the ground separating the new shops there from the public way being given up to form part of such public way, the footpath be paved at an estimated cost of 71*l.* 7*s.*" On October 5 the clerk of the board communicated this resolution to Mr. Lewry, and wrote, "I am instructed by this board to inform you that, upon the ground separating the shops there from the public way being given up to form part of such public way, the foot path in question will be paved by them." No answer was made to that letter, but the footway was paved by the local authority, and there is some evidence that some slight repairs were done by them after that date to this strip of pavement. On the other hand, I find these facts, that from the earliest occupation of the shops the tenants of the shops used this strip of paved land for the purposes of their business by exposing advertisement boards, and, in some cases, goods for sale. It is said that they did not all so use it, and also did not use it at night, and did not perpetually use it. That does not seem to me material. The evidence clearly shews that they made use of this strip as and when they pleased. There is this to be noticed in respect of the user, that, the pavement having been laid without any line of demarcation indicating the existence of a forecourt, the only indication of private ownership of any kind was in the existence of the gratings laid in the strip and having an immediate communication with the cellars in the shops. I think the evidence shews that from the first the right of the owners and occupiers of the shops to place their goods on and to use the strip of land in front was recognized by the authorities. The police occasionally interfered where goods were placed beyond the extreme limits of the gratings, and on one or more occasions the road surveyor himself interfered; but on each occasion the objection taken was not that they were occupying a space in front of their houses, but that they were occupying too much. It seems to me that there could hardly be stronger

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evidence to rebut the presumption of dedication to the public than the use, extending over a period of twenty-three years, of these forecourts by the owners of the shops when they required or desired so to do in a manner inconsistent with the existence of a right of passage by the public. Under these circumstances, and having regard to the interest of Mr. Lewry in October, 1883, is there any evidence upon which I can find, first, a dedication to the public with the consent of the owner of the freehold; and, secondly, a dedication to the public in any sense? With regard to the freeholder, I think it is impossible, upon the evidence, to presume assent on his part. Then it is said that there may be, notwithstanding, a dedication for a term; but it seems to me that this question really does not arise for decision in this case any more than it did in the case of *Attorney-General* v. *Biphosphated Guano Co.* (1), because I think there is no evidence upon which dedication by Mr. Lewry, had he been the owner of the fee, could be found. The question of contract which was relied on before Fry J. in *Attorney-General* v. *Biphosphated Guano Co.* (1) does not arise here, because the communications which took place between Mr. Lewry and the local authority did not amount to an agreement in writing so as to take the matter out of the operation of the Statute of Frauds, nor was possession obtained afterwards by anyone so as to enable specific performance to be granted; and, inasmuch as it was undoubtedly an interest in land, a parol contract of that kind, if it existed, could not create any interest. We are left, therefore, as I think was rightly argued, to the consideration of the question whether, taking the evidence as a whole, the Court ought to find dedication to the public. For the reasons I have already given I think there was no such dedication. I think the user of the tenants absolutely rebuts any presumption of dedication arising from the communications made to Mr. Lewry and his assent to the strip being paved by the local authority. I also think that Mr. Lewry had not such an estate in the land at the date in question as to be able to dedicate. He had, it is true, an assignment of the head lease, and he also held separate underleases of the fifteen shops, but he had mortgaged the head lease by way of

(1) 11 Ch. D. 327.

underlease to a Mr. Nind for the whole period except the last two days, and it seems to me that, if dedication were presumed in this case, it would be liable to fluctuations according to whether or not Mr. Nind's interest remained an interest in possession. But, whether that be so or not, I think I ought to say, having regard to the arguments that have been addressed to me, that, although in the view I take of the evidence it is not material, I have come to the conclusion that there is no such thing known to the law as a dedication of a way for a term. I do not think such an idea was ever heard of prior to the year 1879, the date of the decision in *Attorney-General* v. *Biphosphated Guano Co.*(1) There seem to me to be very good reasons why the public cannot take a right of way for a term. Consequently the title of the plaintiffs to the strip in question is good. That disposes of the first issue, and brings me to the second issue in the case, which is whether or not the defendants were justified in reducing the width of the pavement as they have done. [His Lordship then considered the provisions of the special Acts under which the defendants were purporting to act, and held that their proceedings were ultra vires, and continued:—]

The plaintiffs therefore succeed on both issues. I cannot, however, make a declaration, because all the proper parties are not before the Court, but I grant an injunction to restrain the defendants from trespassing upon the property of the plaintiffs; and the defendants must pay the costs of the action.

Solicitors: *Corsellis & Berney; Seager Berry.*

(1) 11 Ch. D. 327.

H. L. F.

NEVILLE J.
1907
April 10, 11.

In re BIGGE.
GRANVILLE *v.* MOORE.

[1907 B. 641.]

Will—Construction—Annuity—Direction to pay out of Income—Continuing Charge on Income.

There is no rule of construction that a direction to pay an annuity out of the income of a residuary estate, without any words limiting the direction to current income, creates a continuing charge upon income. The intention to create such a charge must be found in the will.

B. by will gave her residuary estate to trustees upon trust to realize and invest, and out of the income thereof to pay certain annuities, and subject thereto to pay the income to T. for her life, and after her death to raise out of the capital thereof certain legacies and, "subject to the trusts aforesaid," to hold the trust premises and the income thereof in trust for certain named persons in equal shares. The income of the testatrix's estate was insufficient to pay the annuities in full:—

Held, that the annuities were not charged upon the corpus, and were not a continuing charge upon the income, but only on the current income, and must fail so far as the current income was insufficient to meet them.

Laura Bigge, widow, by her will dated October 26, 1894, after giving certain pecuniary legacies, including 3000*l.* to her sister Julia Townsend, gave all her residuary estate to three trustees, of whom her brother-in-law Thomas Donald was one, upon trust for conversion and investment; and proceeded, "and my trustees shall out of the income thereof pay to the said Thomas Donald during his life an annuity of 300*l.* free of legacy duty and to the said Elizabeth Reed during her life an annuity of 25*l.* free from legacy duty and to the said Mary Walduck during her life an annuity of 25*l.* free from legacy duty such annuities to commence from my death and to be paid in equal half-yearly payments the first payment to be made at the expiration of six calendar months after my death if the said Thomas Donald, Elizabeth Reed, or Mary Walduck shall be then living and so that during any coverture of the said Mary Walduck or Elizabeth Reed the same shall be paid for their separate use without power of anticipation

and subject thereto shall pay the income of all the said moneys and investments to my said sister Julia Townsend during her life. And after her death I direct my said trustees or trustee to raise out of the capital thereof and pay the following legacies" (the testatrix then gave legacies to twelve different persons, amounting in the whole to 1500*l.*) "and subject to the trusts aforesaid shall hold the said trust premises and the income thereof In trust for" (five persons there named) "or such of them as shall survive me in equal shares."

The testatrix died on November 5, 1895. Her estate was insufficient to pay the annuities in full. By arrangement between the beneficiaries the two smaller annuities were paid in full and the residue of the income paid to Thomas Donald on account of his annuity. Thomas Donald died on January 28, 1902; a sum of 1263*l.* was then due to him for arrears of annuity. Mary Walduck died in his lifetime. Julia Townsend died on June 3, 1906.

This summons was taken out by the trustees of the will for the determination of the question whether the arrears of the annuity of 300*l.* given by the said will to Thomas Donald were a charge upon the corpus of the testatrix's residuary estate, or a continuing charge upon the income thereof, or were not so charged.

The defendants were the executor of Thomas Donald, Elizabeth Gillman, the surviving annuitant, and one of the residuary legatees.

Bovill, for the trustees.

E. Beaumont, for the executor of Thomas Donald. The gift over of the residuary estate in this will is made "subject to the trusts aforesaid"; that is equivalent to subject to the payment of the annuities, and makes the annuities a charge upon the corpus: *Phillips* v. *Gutteridge* (1); *Birch* v. *Sherratt*. (2) But if they are not so charged they are a continuing charge upon the income: *Booth* v. *Coulton* (3); *In re Mason* (4), where Sir George Jessel treats *Booth* v. *Coulton* (3) as establishing a general rule

(1) (1862) 3 D. J. & S. 332.
(2) (1867) L. R. 2 Ch. 644.
(3) (1870) L. R. 5 Ch. 684.
(4) (1878) 8 Ch. D. 411.

NEVILLE J. 1907 BIGGE, *In re.* GRANVILLE *v.* MOORE.

of construction that, where there is a gift of an annuity out of income, with no direction that the annuity is to be paid out of the income to accrue during the life of the annuitant, there is a continuing charge. In *In re Boden* (1) Vaughan Williams and Buckley L.JJ. seem to have distinguished the case before them from *Booth* v. *Coulton* (2) on the ground that after the death of the annuitant there would be conflicting trusts, one to pay the annuity and the other to pay the testator's children. No such point can arise in this case. During the life of Julia Townsend the case is precisely the same as *Booth* v. *Coulton* (2), and the gift of residue after her death subject to the trusts aforesaid cannot affect the rights of the annuitant.

Harman, for the surviving annuitant and the residuary legatee. There is no general gift of an annuity in this case, only a direction to pay out of income and subject thereto to pay the income to Miss Julia Townsend for her life. That clearly means subject to payment out of income; there is no room for a continuing charge. On the death of Julia Townsend there is a direction to raise and pay legacies without any words subject thereto. The words "subject to the trusts aforesaid" in the ultimate gift of residue mean subject to the trust to pay the annuity out of current income. Here there are plain indications that the annuity is to be paid out of current income, as in *Stelfox* v. *Sugden* (3) and *Wormald* v. *Muzeen*. (4) The decision of Fry J. was reversed on appeal. (5) *Baker* v. *Baker* (6) is also in my favour.

Beaumont in reply.

NEVILLE J. I do not think that there is any rule of construction established by the cases which applies to the case before me. The question whether an annuity is payable exclusively out of income, or out of current income, or charged upon the corpus of the estate, or whether it is payable out of accumulated income—in other words, whether the arrears of the annuity in any one year are payable out of the income of succeeding years—in my opinion, after careful consideration of the cases that have been

(1) Ante, p. 132.
(2) L. R. 5 Ch. 684.
(3) (1859) Joh. 234.
(4) (1881) 17 Ch. D. 167.
(5) (1881) 50 L. J. (Ch.) 776; [1881] W. N. 83.
(6) (1858) 6 H. L. C. 616.

cited to me, depends entirely upon the construction to be placed upon the words in the particular will, construing them, so far as possible, in their ordinary grammatical sense. I am confirmed in this view by what is said by Sir George Jessel on appeal in the case of *Wormald* v. *Muzeen* (1) and by what is said by Vaughan Williams L.J. in the case of *In re Boden.* (2) Before I pass from these cases I think I ought to say that, so far as the specific questions in *Wormald* v. *Muzeen* (3) are concerned, it is not a case which can be of very much assistance to anyone in arriving at a conclusion as to the true construction of another will—in the first place, because the references of Fry J. to the provisions of the will are, to my mind, as reported not very intelligible; and, secondly, because the report in the Court of Appeal purports to shew that the learned judges having directed their attention exclusively to the question of whether or not the annuity was charged upon the corpus of the estate; and, having come to the conclusion that it was not, reversed the decision of Fry J., though he had also decided that there was no charge on the corpus. With regard to the suggested construction that the annuity if not charged upon the corpus is yet charged upon the income in such a way that arrears of the annuity must be satisfied out of future income, in my opinion such an intention ought not to be imputed to a testator unless the words are clear. Before arriving at such a conclusion upon any particular will, the very forcible observation of Wood V.C. in the case of *Stelfox* v. *Sugden* (4) as to the improbability of any such intention being entertained by a testator should, I think, be carefully considered.

Now, turning to the words of the present will, and construing them according to their natural meaning, I find that the annuity is to be paid out of the income of the estate, and after payment of the annuity the balance of the income is to be paid to Julia Townsend during her life, and that payment to her is to be "subject thereto": it seems to me that the words "subject thereto" mean subject to the payment of the annuities out of the income. Then, after the death of the tenant for life, some considerable sums are directed to be raised; and then, "subject to the trusts

(1) 50 L. J. (Ch.) 776; [1881] W. N. 83.
(2) Ante, p. 138.
(3) 17 Ch. D. 167.
(4) Joh. 234.

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aforesaid," the trustees are directed to hold the premises, and the income thereof, upon certain trusts for individuals. It seems to me that I cannot apply any other meaning to the words " subject to the trusts aforesaid " than I have already applied to the words " subject thereto " a little earlier in the will. I think that the import of those two expressions is precisely the same, and I find nothing whatever to indicate any intention to charge the annuity upon the corpus of the estate. In considering whether the testatrix intended that the annuities should be paid out of the current income, or whether she desired in the case of an insufficiency of the current income to provide for the satisfaction of the annuities out of the income accruing in future, I notice that she did not consider the possibility of an insufficiency of the current income to provide for the annuities which she had given by her will. I say this for two reasons—first, because she deals with a supposed surplus of income which she gives to Julia Townsend during her life; secondly, because upon the death of Julia Townsend she directs the raising of considerable sums which are obviously intended to be without prejudice to the receipt by the annuitants of the annuities which had already been given to them. I conclude, therefore, that the testatrix had not in her mind at all the question of an insufficiency of the current income to meet the annuities which she had given, and, if I were to find the expression of an intention in this will to provide for that contingency, it seems to me that I should be finding expressed what the testatrix clearly never intended to express, because she never had the contingency in her mind at all. It seems to me, therefore, that upon the true construction of this will the annuities were intended to be paid out of the current income, and the balance of the current income was intended to go to Julia Townsend for her life and afterwards was disposed of in the way declared by the will. Consequently, so far as the current income was insufficient to meet the annuities, the annuities fail.

Solicitors: *Lawrence, Graham & Co.*; *Wilde, Moore, Wigston & Co.*

J. R. B.

PARKER J.
1907
March 7.

In re SCHWABACHER.
STERN *v.* SCHWABACHER.

[1906 S. 756.]

Practice—Administration—Creditor's Action—Attendance at Proceedings—Leave to Attend—Creditor not a Party to the Action—Rules of Supreme Court, Order XVI., *rr.* 41, 47; *Order* LV., *r.* 42; *Order* LXV., *r.* 27, *sub-r.* 23.

An order had been made in a creditor's action for accounts and inquiries and the administration of the estate of S. A creditor whose debt had been admitted for 10,000*l.* applied for leave to attend the proceedings at his own expense, or that he might at his own expense be supplied by the defendants' solicitors with a copy of the list of claims lodged in the action and copies of affidavits relating thereto, and that the defendants might be directed to give him notice of all proceedings to be taken under the order in reference to claims against the estate:—

Held, that there was no power under the rules to give leave; that this was a matter for the discretion of the Court under the general power of the judge to manage the business in his own chambers; that general leave to attend the proceedings would impede the progress of business in chambers and ought not to be given; that the applicant might, if he desired to do so, make a further application for leave to contest any particular claim; and that he ought to be supplied by the defendants with copies of the affidavits and the list of claims at his own expense.

In an action brought by Albert Stern on behalf of himself and all other creditors of Ernest Schwabacher against his administrators an order was made for the administration of the estate in the usual form. It directed an account of what was due to the plaintiff and all other the creditors of Schwabacher; an account of the intestate's funeral expenses; an account of his personal estate; an inquiry what parts (if any) of his personal estate were outstanding or undisposed of: and it was ordered that his personal estate should be applied in payment of his debts and funeral expenses in due course of administration. Further consideration of the action was adjourned, and any of the parties were to be at liberty to apply as there might be occasion.

This was a summons by Mr. Wertheimer, an admitted creditor for 10,000*l.*, asking that he might be at liberty to attend the

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proceedings under the order at his own expense, or in the alternative that he might at his own expense be supplied by the defendants' (by mistake described in the summons as the plaintiff's) solicitors with a copy of the list of claims lodged in the action and copies of any affidavits which he might require relating thereto; and that the defendants might be directed to give notice from time to time to him or to his solicitors of all proceedings to be taken under the order in reference to claims against the estate.

The defendants had given Mr. Wertheimer's solicitors inspection of the affidavits, and had sent them a copy of the list of claims. The estate was said to be worth about 50,000*l.* and the debts amounted to over 100,000*l.*

John Henderson, for the summons. Every creditor has a right to contest the claim of every other creditor, therefore we ought to have general leave to attend the proceedings so as to ascertain what the claims are. We are prepared to pay all the costs so far as they are increased by reason of our attendance. An order is necessary to enable us to attend: note to Order XVI., r. 41, Annual Practice, 1907, p. 183; Seton on Judgments, 6th ed. p. 325. It is thus recognized that in some cases a creditor can obtain leave to attend. Under Order XVI., r. 47, the plaintiff can get leave to attend the proceedings, but that does not apply to us, for we are not parties to the action. Under Order LV., r. 42, and Order LXV., r. 27, sub-r. 23, parties to the action may attend at their own expense, but that, again, does not help us, for we are not parties. We are entitled to contest the claim of every other creditor: *Owens* v. *Dickenson* (1), which was followed in other cases and is cited in Daniell's Chancery Practice, 7th ed. vol. i. p. 832. A creditor has a similar right to contest proofs in bankruptcy: *Ex parte Merriman.* (2) To do that we must be in a position to get information. We cannot entrust our interests to the plaintiff, for he has not taken the trouble to apply for leave to attend.

E. Ford (*Buckmaster, K.C.*, with him), for the defendants. Business in chambers will be impeded, if not entirely stopped, if leave to attend is given to all the creditors. No special grounds

(1) (1840) Cr. & P. 48, 56. (2) (1883) 25 Ch. D. 144.

are alleged for the indulgence. Mr. Wertheimer is not even the largest creditor. The rule is stated too widely in *Owens* v. *Dickenson*. (1) In Daniell's Chancery Practice, 7th ed. vol. i. p. 832, a creditor is said to have a right to contest the claim of "any" other creditor—that is to say, he may apply for leave to attend in respect of any particular claim, as was done in *Ex parte Merriman*. (2) There is no suggestion here that any particular debt has been wrongly admitted, or that the claims will not be properly contested. None of the rules apply. They all refer to persons who are parties to the action, including, according to s. 100 of the Judicature Act, 1873, every person served with notice of or attending the proceedings.

George Hart, for the plaintiff in the action. We adopt the defendants' argument. The applicant's undertaking to pay all the costs is not enough. Expense is not the only consideration. He ought not to be allowed to cross-examine the creditors whilst we are shut out by the rules; and great delay would be caused by his doing so.

Henderson in reply.

PARKER J. This is an application in an administration action brought by the plaintiff on behalf of himself and all the other creditors, in which the usual decree involving an inquiry as to debts has been made. Mr. Wertheimer has taken out a summons asking that I should, under what is an undoubted discretionary power in the judge, give him leave to attend generally the proceedings in the administration action, and he puts his claim forward in this way. He says: "I am one of the largest creditors, and my debt is 10,000*l*. There are large claims, amounting to at least 100,000*l*., against the estate. The estate itself is not worth more than 40,000*l*. or 50,000*l*., and if I can knock out some of these large claims by disputing the debts my dividend will be correspondingly increased." I do not think Mr. Henderson puts his application as a matter of right; he is really appealing to the discretionary jurisdiction of the Court.

It appears from Order XVI., r. 47, that with regard to attendances in Court or in chambers on claims made in answer to

(1) Cr. & P. 48, 56. (2) 25 Ch. D. 144.

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advertisements against an estate, by persons who are not parties to the action, even the plaintiff creditor has no right to attend. The words of the rule are: "In any cause or matter for the administration of the estate of a deceased person, no party other than the executor or administrator shall, unless by leave of the Court or a judge, be entitled to appear either in Court or chambers on the claim of any person not a party to the cause or matter against the estate of the deceased person in respect of any debt or liability. The Court or a judge may direct or give liberty to any other party to the cause or matter to appear, either in addition to or in the place of the executor or administrator, upon such terms as to costs or otherwise as they or he shall think fit."

Now I am not quite sure whether the last words of this section really apply to Mr. Henderson's client, for this reason, that he is not a party. As I understand the practice, a creditor, as such, is never served with notice of the administration judgment. In that respect it differs from the old practice in debenture-holders' actions where the debenture-holders had a charge upon the estate. A creditor comes in under the advertisement for claims, but he is never made a party by service of notice of judgment; and I think if I give Mr. Henderson's client leave to attend now it will not be under Order XVI., r. 47, but under a general discretion and general control which the judge has over an administration action attached to his chambers. Similarly Order LV., r. 42, has only an application to the parties—that is to say, persons who were originally on the record as parties to the action, and persons who have been made parties to the action, either by service of notice of judgment, or of some other order of the Court, giving them leave to attend; so Mr. Wertheimer has no right to attend by virtue of r. 42. If I fall back upon the general jurisdiction of the judge over an action in his own chambers, the question is largely a matter of convenience. Of course, I do not deny that any creditor can, if so advised, take proceedings to resist the claim of any other creditor which he thinks ought to be contested. At any rate, if the parties to the action do not desire to dispute a claim he can do so, and he will have to do it at his own expense. In the present case it is not

suggested that the administrators or the plaintiff creditor are not going to do their duty. If I were to allow every creditor, simply because he had a large interest at stake, to attend proceedings generally in an administration action, even at his own expense, the proceedings in chambers would be embarrassed in the greatest possible degree. I have made inquiries as to what would be the result of admitting even one creditor; and it would appear that on every appointment in chambers a creditor having leave to attend would as a matter of right be entitled to notice. In an estate of this sort, where there are more than a hundred claims, the number of appointments in chambers would be exceedingly great, and the cost of serving Mr. Wertheimer with notice of every one of them would be correspondingly heavy; and besides that, this might occur, that if Mr. Wertheimer did not appear at the appointment, then there would have to be evidence produced to the Master that service on him had been effected so that the Master could proceed in his absence, and that might lead to a great expense in filing evidence of service on him. Now if all this is multiplied by the number of creditors who have large interests in this estate, the expense that would be involved would become very heavy. Mr. Wertheimer says in this particular case—and I do not see how he could avoid saying it—that he is ready to pay not only his own costs, but the costs of every party to the action so far as they are increased by reason of his attendance; but at the same time I must remember this, that if I make an order in his favour he will get a right which even the plaintiff creditor has not, and that he will for a good many purposes supersede the plaintiff creditor, and, as far as I can tell, without any reason why that creditor should be superseded. There is no reason suggested why the plaintiff creditor should not do his duty in contesting the claims of other creditors in cases where he can obtain leave to attend under Order XVI., r. 47. There is no suggestion that he will not do his duty. That being so, it seems to me that, as a matter of convenience and in exercise of the discretion which the Court has, no order ought to be made giving Mr. Wertheimer general liberty to attend. At the same time I think that if he desires to dispute any particular claim which the administrator

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or the plaintiff creditor, as the case may be, would not otherwise dispute, he will have a right to come to the Court and say, "I desire to come to exercise my right of disputing another creditor's claim on the estate, and I want leave and facilities given to me for so doing in chambers." Of course, the refusal I make in the present case to Mr. Wertheimer's application is without prejudice to any subsequent application which he may make on any particular occasion if he thinks it desirable that he should dispute another creditor's debt.

The other part of the summons relates to the supply of copies of affidavits which have been filed in the course of the proceedings in the action. I have already intimated in chambers that the administrators who are ready to supply copies on the usual terms as to costs may without impropriety supply such copies in the case of a creditor, so Mr. Wertheimer can have copies of the affidavits filed, the list of claims, and other documents in the action. He will thus have notice of what is being done, and he will be in a position to elect whether he will or will not make any application in regard to any particular claim. I understand the costs of the administrators and the costs of the action will not be increased in any degree by the fact that copies are supplied to creditors upon the usual terms.

That being the case, I think the application fails, and Mr. Wertheimer must pay the costs.

Solicitors: *Dawes & Sons; Beyfus & Beyfus; Lumley & Lumley.*

H. C. R.

END OF VOL. I.

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1, 1907, will be as follows :—

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[1907] 1 Ch. [1907] 2 Ch.

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The fourth of the periods mentioned in the Thellusson Act during which accumulation is allowed, viz., "The minority or respective minorities only of any person or persons who, under the . . . . trusts of the . . . . will . . . . directing such accumulations, would, for the time being, if of full age, be entitled unto the rents . . . . so directed to be accumulated," is not confined to the minority of persons born in the testator's lifetime.

The dicta in *Haley* v. *Bannister*, (1819) 4 Madd. 275, and *Jagger* v. *Jagger*, (1883) 25 Ch. D. 729, discussed and not followed. *In re* CATTELL. CATTELL *v.* CATTELL **Neville J. 567**

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ADMINISTRATION—*Contingent Future Liabilities — Return of Assets — Rights of Future Creditor— Distribution — Practice — Parties — Rules of Supreme Court, Order* LV., *r.* 3, *sub-ss.* (*e*), (*g*); *r.* 5.

The executors of a testator whose estate comprised shares of 10*l.* each in a limited company, of which only 4*l.* had been called up, took out a summons for a declaration that they were entitled to distribute the estate among the residuary legatees notwithstanding the possible future liability on the shares. The beneficiaries and the company were made defendants :—

Held—(1.) that the company could not be brought before the Court adversely on such a question, and the summons as against them must be dismissed with costs ; (2.) that it is not the practice of the Court to retain funds in Court for the protection of a contingent future creditor, and it is unnecessary to do so for the protection of the executors, for they are sufficiently protected by the order of the Court in the administration of an estate.

Semble, such an order would not protect the executor unless made in the administration of the estate. The summons was therefore ordered to stand over for an inquiry as to debts and legacies. The cases as to retainer of assets and indemnity to executors examined. *In re* KING. MELLOR *v.* SOUTH AUSTRALIAN LAND MORTGAGE AND AGENCY COMPANY **Neville J. 72**

2. —— *Practice — Concurrent Actions—Conduct of Proceedings.*

The general rule that where there are concurrent actions for administration the conduct

ADMINISTRATION—*continued.*

of proceedings under an order made in either action will be given to the plaintiff in the action first commenced does not apply where that plaintiff is a creditor whose claim is bona fide disputed. *In re* Ross. Wingfield *v.* Blair
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3. —— *Practice—Creditor's Action—Attendance at Proceedings—Leave to attend—Creditor not a party to the action—Rules of Supreme Court, Order* XVI., *rr.* 41, 47; *Order* LV., *r.* 42; *Order* LXV., *r.* 27, *sub-r.* 23.

An order had been made in a creditor's action for accounts and inquiries and the administration of the estate of S. A creditor whose debt had been admitted for 10,000*l.* applied for leave to attend the proceedings at his own expense, or that he might at his own expense be supplied by the defendants' solicitors with a copy of the list of claims lodged in the action and copies of affidavits relating thereto, and that the defendants might be directed to give him notice of all proceedings to be taken under the order in reference to claims against the estate:—

Held, that there was no power under the rules to give leave; that this was a matter for the discretion of the Court under the general power of the judge to manage the business in his own chambers; that general leave to attend the proceedings would impede the progress of business in chambers and ought not to be given; that the applicant might, if he desired to do so, make a further application for leave to contest any particular claim; and that he ought to be supplied by the defendants with copies of the affidavits and the list of claims at his own expense. *In re* Schwabacher. Stern *v.* Schwabacher - - - **Parker J. 719**

ADMINISTRATION — *Specialty Debt — Mortgagor—Covenant—Real Assets—Specific Devisees—Payment of Interest by one Devisee—Testator's General Estate—Acknowledgment — Real Property Limitation Act*, 1874 (37 *&* 38 *Vict. c.* 57), *s.* 8.

Payment of interest by the specific devisee of part a testator's real estate, which was subject to a mortgage created by the testator, is sufficient to keep the mortgagee's right of action alive against the specific devisees of other parts of the real estate which was not subject to the mortgage, and thus entitle the mortgagee to an order for administration of the whole of the testator's real estate.

The principles laid down in *Roddam* v. *Morley*, (1857) 1 De G. & J. 1, applied.

Bradshaw v. *Widdrington*, [1902] 2 Ch. 430, discussed. *In re* Lacey. Howard *v.* Lightfoot - - - - - - **C. A. 330**

AGENT—Principal and.
See under Principal and Agent.

ANCIENT LIGHTS.
See under Light and Air.

ANNUITY—*Direction to pay out of Income—Continuing Charge on Income—Will—Construction.*

There is no rule of construction that a direction to pay an annuity out of the income of a residuary estate, without any words limiting the direction to current income, creates a continuing charge upon income. The intention to create such a charge must be found in the will.

ANNUITY—*continued.*

B. by will gave her residuary estate to trustees upon trust to realize and invest, and out of the income thereof to pay certain annuities, and subject thereto to pay the income to T. for her life, and after her death to raise out of the capital thereof certain legacies and, "subject to the trust aforesaid," to hold the trust premises and the income thereof in trust for certain named persons in equal shares. The income of the testatrix's estate was insufficient to pay the annuities in full:—

Held, that the annuities were not charged upon the corpus, and were not a continuing charge upon the income, but only on the current income, and must fail so far as the current income was insufficient to meet them. *In re* Bigge. Granville *v.* Moore
Neville J. 714

2. —— *Will — Annuity — Direction to Pay out of Income — Alternative Gift — Charge on Corpus—Continuing Charge on Income.*

A testator gave all his residuary real and personal estate to trustees upon trust for sale and conversion and investment, and to hold the same "In case I shall leave any child living at my decease then upon trust to pay to my said wife during her life and so long as any child of mine shall be living such a sum out of the income of my residuary trust funds as with the income which my said wife shall from time to time receive under or by virtue of the settlement made on our marriage shall make up the total annual income of 8000*l.* But in case I shall leave no child surviving me or leaving such every such child shall die in the lifetime of my wife then upon trust to pay to her during her life such further sum as with the income to be derived from the said settlement shall make up the annual sum of 10,000*l.* and I direct that the said annual sums of 8000*l.* or 10,000*l.* as the case may be shall be deemed to commence and be payable as from my death and subject to the trusts aforesaid in trust to divide my said residuary trust funds unto and equally between all and every my children" who shall attain twenty-one or marry. "But in case I shall leave no child surviving me who shall take a vested interest in my said residuary trust funds then subject to the trusts aforesaid I give and bequeath the same to my nephew H." There was no child of the marriage, and the income of the testator's residuary estate was insufficient to pay the annuity:—

Held by Vaughan Williams and Buckley L.JJ. (dissentiente Fletcher Moulton L.J.), that the direction to pay out of income, though expressed only in the case of the 8,000*l.* annuity, applied also to the 10,000*l.* annuity, and that this direction charged the annuity only on income during the widow's life, and did not create either a charge on the corpus or a continuing charge on the income. *In re* Boden. Boden *v.* Boden
C. A. 132

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—— School—Appeal by managers—Decision of Board of Education—Jurisdiction of Court—Closing of school – – **504**
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See under POWER OF APPOINTMENT.

APPORTIONMENT — *Dividends on Shares — Company's Articles—Express Stipulation against Apportionment — Apportionment Act*, 1870 (33 & 34 *Vict. c.* 35), *s.* 7.

A testator bequeathed certain shares in a company to his trustees upon trust to pay "the income arising therefrom" to his wife for life.

The testator died on January 4, 1906.

Some time after his death a dividend for the financial year ending October 31, 1905, was declared. The full dividend for the next financial year was not yet declared.

The company's articles provided (inter alia) as follows :—

Article 90: "Every dividend, whether arising from past or current profits, shall for all purposes be deemed to accrue and fall due upon the day on which it is declared, and not before."

Article 91: "Every dividend shall belong and be paid (subject to the company's lien) to those members who shall be on the register at the date when every such dividend is declared, notwithstanding any subsequent transfer or transmission of shares" :—

Held that, as between the testator's estate and the widow, these articles did not amount to an express stipulation against apportionment within s. 7 of the Apportionment Act, 1870, and the dividends were therefore apportionable.

Whether the express stipulation referred to in s. 7 can be contained elsewhere than in a will or other instrument of gift, *quære*. *In re* OPPENHEIMER. OPPENHEIMER *v.* BOATMAN **Swinfen Eady J. 399**

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BREWERY COMPANY—*Debenture Trust Deed Mortgaged Licensed Premises—Non-renewal of Licence—Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *s.* 2—*Compensation—Capital Moneys—Investment—Powers of Debenture Trustees.*

A brewery company by deed conveyed all its licensed premises to trustees to secure an issue of debenture stock. The deed empowered the trustees to permit the company to hold and enjoy the mortgaged premises until the security became enforceable (which event had not happened), and provided (clause 20) that at any time before the security became enforceable the trustees might with the concurrence of the company sell, lease, and exchange any of the mortgaged premises, and also "settle, adjust, refer to

BREWERY COMPANY—*continued.*

arbitration, compromise and arrange all . . . . controversies, questions, claims and demands whatsoever, open, unsettled or pending with any person or persons in relation to the mortgaged premises," and also generally might "act in relation to the mortgaged premises in such manner as the trustees might think expedient in the interests of the stockholders"; and declared (clause 21) that the trustees should hold "all capital moneys arising under clause 20" upon trust for investment in (inter alia) other licensed premises. The deed also contained the usual trust investment clause. The licensing authority having refused under the powers of the Licensing Act, 1904, to renew the licence of one of the licensed premises comprised in the trust deed compensation was awarded under the Act to the company in respect thereof. The trustees were not parties to the compensation proceedings:—

Held (following *Law Guarantee and Trust Society, Ld.* v. *Mitcham and Cheam Brewery Co., Ld.*, [1906] 2 Ch. 98), that the compensation money must be paid to the trustee of the debenture deed.

Held also, that the compensation proceedings were a "controversy in relation to the mortgaged premises" within the meaning of clause 20, and, therefore, that the compensation moneys were "capital moneys arising under clause 20" which the trustees could in the exercise of their discretion apply under clause 21 in the purchase of other licensed premises. NOAKES *v.* NOAKES & CO., LIMITED - - - - **Neville J. 64**

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[1907] 1 Ch. 394

—— *Bloomer* v. *Spittle* (1872) L. R. 13 Eq. 427
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—— *Bouch* v. *Sproule* (1887) 12 App. Cas. 385
Referred to by Neville J. *In re* PIERCEY - - - **[1907] 1 Ch. 289**

—— *Bradshaw* v. *Widdrington*, [1902] 2 Ch. 430.
Discussed by C. A. *In re* LACEY
[1907] 1 Ch. 330

—— *British Power Traction and Lighting Co., In re. Halifax Joint Stock Banking Co.* v. *British Power Traction and Lighting Co.*, [1906] 1 Ch. 497.
Further report of this case: See *In re* BRITISH POWER TRACTION AND LIGHTING CO. HALIFAX JOINT STOCK BANKING CO. *v.* BRITISH POWER TRACTION AND LIGHTING CO. (No. 2)
Warrington J. [1907] 1 Ch. 528

—— *Bryant and Barningham's Contract, In re*, (1890) 44 Ch. D. 218.
Distinguished by Swinfen Eady J. *In re* BAKER AND SELMON'S CONTRACT
[1907] 1 Ch. 238

—— *Chaytor, In re* - - [1905] 1 Ch. 233
Distinguished by Swinfen Eady J. *In re* WILSON. MOORE *v* WILSON
[1907] 1 Ch. 394

—— *Clitheroe Estate, In re*, (1885) 31 Ch. D. 135.
Distinguished by Swinfen Eady J. *In re* BARONESS LLANOVER
[1907] 1 Ch. 635

—— *Colls* v. *Home and Colonial Stores, Ld.*, [1904] A. C. 179.
Applied by C. A. ANKERSON *v.* CONNELLY - - - **[1907] 1 Ch. 678**

—— *Cumming, In re* (1852) 1 D. M. & G. 537
Applied by C. A. *In re* GILCHRIST
[1907] 1 Ch. 1

—— *David* v. *Rees*- - [1904] 2 K. B. 435
Followed by Parker J. BAKE *v.* FRENCH- - - **[1907] 1 Ch. 428**

—— *Davies* v. *Fitton* (1842) 2 D. & War. 225
Followed by Neville J. THOMPSON *v.* HICKMAN - - **[1907] 1 Ch. 550**

CASES—*continued.*

—— *Dawes* v. *Hawkins*, (1860) 8 C. B. (N.S.) 844, 858.
Dictum of Byles J. in, adopted by Neville J. CORSELLIS *v.* LONDON COUNTY COUNCIL – [1907] 1 Ch. 704

—— *Dawson, In re* – – [1906] 2 Ch. 211
Not followed by Kekewich J. *In re* HENRY – – – [1907] 1 Ch. 30

—— *Direct Spanish Telegraph Co.* v. *Shepherd*, (1884) 13 Q. B. D. 202.
Followed by C. A. BOURNE & TANT *v.* SALMON & GLUCKSTEIN, LD. [1907] 1 Ch. 616

—— *Eardley* v. *Granville* (1876) 3 Ch. D. 826
Followed by Warrington J. BATTEN POOLL *v.* KENNEDY– [1907] 1 Ch. 256

—— *Ferneley's Trusts, In re* [1902] 1 Ch. 543
Followed by Warrington J. *In re* GAME – – – [1907] 1 Ch. 276

—— *Foster* v. *Mackinnon*, (1869) L. R. 4 C. P. 704.
Distinguished by Warrington J. HOWATSON *v.* WEBB – [1907] 1 Ch. 537

—— *Gosling* v. *Gosling*– – (1859) Joh. 265
Applied by Joyce J. *In re* COUTURIER [1907] 1 Ch. 470

—— *Gough* v. *Wood & Co.* [1894] 1 Q. B. 713
Distinguished by Parker J. *In re* SAMUEL ALLEN & SONS, LD. [1907] 1 Ch. 575

—— *Haley* v. *Bannister*– (1819) 4 Madd. 275
Discussed and not followed by Neville J. *In re* CATTELL – [1907] 1 Ch. 567

—— *Hamilton* (*Duke of*) v. *Graham*, (1871) L. R. 2 H. L. Sc. 166.
Followed by Warrington J. BATTEN POOLL *v.* KENNEDY– [1907] 1 Ch. 256

—— *Harding* v. *Queensland Stamp Commissioners*, [1898] A. C. 769, 775.
Distinguished by Swinfen Eady J. *In re* LOVELL AND COLLARD'S CONTRACT [1907] 1 Ch. 249

—— *Head's Trustees and Macdonald, In re*, (1890) 45 Ch. D. 310.
Distinguished by Swinfen Eady J. *In re* BAKER AND SELMON'S CONTRACT [1907] 1 Ch. 238

—— *Heath* v. *Pugh*, (1881) 6 Q. B. D. 345, 360
Discussed by Swinfen Eady J. *In re* LOVELL AND COLLARD'S CONTRACT [1907] 1 Ch. 249

—— *Henry Leetham & Sons, Ld.* v. *Johnstone-White*, [1907] 1 Ch. 189.
Reversed by C. A. – [1907] 1 Ch. 322

—— *Herbert* v. *Webster* (1880) 15 Ch. D. 610
Followed by Warrington J. *In re* GAME – – – [1907] 1 Ch. 276

—— *Hobson* v. *Gorringe* – [1897] 1 Ch. 182
Distinguished by Parker J. *In re* SAMUEL ALLEN & SONS, LD. [1907] 1 Ch. 575

CASES—*continued.*

—— *Hopkins* v. *Great Northern Ry. Co.*, (1877) 2 Q. B. D. 224, 230.
Dictum of Mellish L.J. in, approved and followed by Neville J. DIBDEN *v.* SKIRROW – – [1907] 1 Ch. 437

—— *Howe* v. *Dartmouth* (*Earl of*), 7 Ves. 137a, operation of rule in, excluded by Kekewich J. *In re* BATES [1907] 1 Ch. 22

—— *Huntington* v. *Inland Revenue Commissioners*, [1896] 1 Q. B. 422.
Discussed by Swinfen Eady J. *In re* LOVELL AND COLLARD'S CONTRACT [1907] 1 Ch. 249

—— *Jagger* v. *Jagger* – (1883) 25 Ch. D. 729
Discussed and not followed by Neville J. *In re* CATTELL – [1907] 1 Ch. 567

—— *Jones, In re* – (1884) 26 Ch. D. 736. 742
Followed as to cl. vi., and distinguished as to cl. ix. by Swinfen Eady J. *In re* BARONESS LLANOVER [1907] 1 Ch. 635

—— *Jones* v. *Smith*, (1841) 1 Hare, 43 ; (1843) 1 Ph. 244.
Applied by Kekewich J. DAVIS *v.* HUTCHINGS – [1907] 1 Ch. 356

—— *Jude's Musical Compositions, In re*, [1906] 2 Ch. 595.
Affirmed by C. A. – [1907] 1 Ch. 651

—— *Keech* v. *Sandford*. (1726) Sel. Cas. 61 ; 2 W. & T. 7th ed. p. 693.
Principles of, applied by Parker J. GRIFFITH *v.* OWEN [1907] 1 Ch. 195

—— *Kibble* v. *Fairthorne* – [1895] 1 Ch. 219
Discussed by Warrington J. *In re* HAZELDINE'S TRUSTS [1907] 1 Ch. 686

—— *Law Guarantee and Trust Society, Ld.* v. *Mitcham and Cheam Brewery Co.*
Followed by Neville J. NOAKES *v.* NOAKES & CO. – [1907] 1 Ch. 64

—— *King's Case* – (1871) L. R. 6 Ch. 196
Principle of, applied by Parker J. *In re* NATIONAL BANK OF WALES, LIMITED. MASSEY AND GIFFIN'S CASE – – – [1907] 1 Ch. 582

—— *List* v. *Tharp* – [1897] 1 Ch. 260
Discussed by Neville J. CROSBY *v.* ALHAMBRA COMPANY [1907] 1 Ch. 295

—— *Llanover* (*Baroness*), *In re*, [1903] 2 Ch. 330
Discussed by Swinfen Eady J. *In re* BARONESS LLANOVER. HERBERT *v.* RAM – – [1907] 1 Ch. 635

—— *Lloyd, In re* – – [1903] 1 Ch. 385
Applied by Warrington J. *In re* HAZELDINE'S TRUSTS [1907] 1 Ch. 686

—— *Lowther* v. *Caledonian Ry. Co.*, [1892] 1 Ch. 73, 82, 83, 85.
Applied by Swinfen Eady J. LORD LECONFIELD *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY [1907] 1 Ch. 38

—— *Macmillan & Co.* v. *Dent* [1906] 1 Ch. 101
Affirmed by C. A. [1907] 1 Ch. 107

—— *May* v. *Platt* – [1900] 1 Ch. 616
Followed by Neville J. THOMPSON *v.* HICKMAN – [1907] 1 Ch. 550

CASES—*continued.*

—— *Money Kyrle's Settlement, In re*, [1900] 2 Ch. 839.
Distinguished by Swinfen Eady J. *In re* BARONESS LLANOVER
[1907] 1 Ch. 635

—— *National Bank of Wales (Taylor, Phillips, and Richards' Cases), In re*, [1897] 1 Ch. 298.
See *In re* NATIONAL BANK OF WALES, LIMITED. MASSEY AND GIFFIN'S CASE – **Parker J. [1907] 1 Ch. 582**

—— *National Provincial Bank of England* v. *Jackson*, (1886) 33 Ch. D. 1.
Followed by Warrington J. HOWATSON *v.* WEBB – **[1907] 1 Ch. 537**

—— *Parker, In re* – (1880) 16 Ch. D. 44
Rule laid down in, followed by Neville J. *In re* WILLIAMS – **[1907] 1 Ch. 180**

—— *Pearson* v. *Spencer* (1863) 3 B. & S. 761
Applied by Kekewich J. MILNER'S SAFE COMPANY *v.* GREAT NORTHERN AND CITY RAILWAY COMPANY
[1907] 1 Ch. 208

—— *Phillips* v. *Low* – [1892] 1 Ch. 47
Applied by Kekewich J. MILNER'S SAFE COMPANY *v.* GREAT NORTHERN AND CITY RAILWAY COMPANY
[1907] 1 Ch. 208

—— *Pickering* v. *Stephenson*, (1872) L. R. 14 Eq. 322.
Explained by C. A. PEEL *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY – – **[1907] 1 Ch. 5**

—— *Power, In re* – – [1901] 2 Ch. 659
Followed by Warrington J. *In re* DODSON – – – **[1907] 1 Ch. 284**

—— *Proud* v. *Bates* (1865) 34 L. J. (Ch.) 406
Followed by Warrington J. BATTEN POOLL *v.* KENNEDY **[1907] 1 Ch. 256**

—— *Pugh and Sharman's Case*, (1872) L. R. 13 Eq. 566.
Distinguished by Parker J. *In re* NATIONAL BANK OF WALES, LIMITED. MASSEY AND GIFFIN'S CASE
[1907] 1 Ch. 582

—— *Ramsay* v. *Blair* (1876) 1 App. Cas. 701
Distinguished by Warrington J. BATTEN POOLL *v.* KENNEDY
[1907] 1 Ch. 256

—— *Reg.* v. *Cambrian Ry. Co.*, (1871) L. R. 6 Q. B. 422, 430.
Judgment of Blackburn J. on one point in, not followed by Neville J. DIBDEN *v.* SKIRROW – – **[1907] 1 Ch. 437**

—— *Reynolds* v. *Ashby & Son*, [1903] 1 K. B. 87; [1904] A. C. 46.
Distinguished by Parker J, *In re* SAMUEL ALLEN & SONS, LD.
[1907] 1 Ch. 575

—— *Richardson, In re* – [1900] 2 Ch. 778
Distinguished by Swinfen Eady J. *In re* BARONESS LLANOVER
[1907] 1 Ch. 635

CASES—*continued.*

—— *Richardson's Case*, (1875) L. R. 19 Eq. 588
Distinguished by Parker J. *In re* NATIONAL BANK OF WALES, LIMITED. MASSEY AND GIFFIN'S CASE
[1907] 1 Ch. 582

—— *Ridley, In re* – (1879) 11 Ch. D. 645
Not followed by Warrington J. *In re* GAME – – – **[1907] 1 Ch. 276**

—— *Roddam* v. *Morley*, (1857) 1 De G. & J. 1
Principles laid down in, applied by C. A. *In re* LACEY **[1907] 1 Ch. 330**

—— *Russell, In re* – – [1895] 2 Ch. 698
Applied by Warrington J. *In re* GAME
[1907] 1 Ch. 276

—— *Salisbury (Marquis of) and London and North Western Ry. Co., In re*, (1879) [1892] 1 Ch. 75, n.
Applied by Swinfen Eady J. LORD LECONFIELD *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY
[1907] 1 Ch. 38

—— *Scholefield, In re. Scholefield* v. *St. John*, [1905] 2 Ch. 408.
Settlement agreed upon. C. A.
[1907] 1 Ch. 664

—— *Searle, In re* – – [1900] 2 Ch. 829
Followed by Kekewich J. *In re* EARL OF DARNLEY – **[1907] 1 Ch. 159**

—— *Sheldon, In re* – – (1888) 39 Ch. D. 50
Followed by Swinfen Eady J. *In re* WILSON. MOORE *v.* WILSON
[1907] 1 Ch. 394

—— *Slater, In re. Slater* v. *Slater*, [1906] 2 Ch. 480.
Affirmed by C. A. – **[1907] 1 Ch. 665**

—— *Society of Accountants in Edinburgh* v. *Corporation of Accountants, Ld.*, (1893) 20 R. 750.
Followed by Warrington J. SOCIETY OF ACCOUNTANTS AND AUDITORS *v.* GOODWAY AND LONDON ASSOCIATION OF ACCOUNTANTS, LIMITED
[1907] 1 Ch. 489

—— *Studdert* v. *Grosvenor*, (1886) 33 Ch. D. 528.
Overruled on one point by C. A. PEEL *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY – – **[1907] 1 Ch. 5**

—— *Sturge and Great Western Ry. Co.*, (1881) 19 Ch. D. 444.
Distinguished by Parker J. *In re* WILSON. WILSON *v.* BATCHELOR
[1907] 1 Ch. 450

—— *Turner* v. *Turner*, (1852) 21 L. J. (Ch.) 843.
Followed by Parker J. *In re* JACOB
[1907] 1 Ch. 445

—— *Vine* v. *Raleigh* – – [1896] 1 Ch. 37
Not followed by Swinfen Eady J. *In re* JEMMETT AND GUEST'S CONTRACT
[1907] 1 Ch. 629

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—— *Wilson's Estate, In re*, (1862) 2 J. & H. 619, 623 ; (1863) 3 D. J. & S. 410, 417.
Applied by Swinfen Eady J. LORD LECONFIELD *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY
[1907] **1 Ch. 38**

—— *Wimbledon and Putney Commons Conservators* v. *Dixon*, (1875) 1 Ch. D. 362, 368.
Principle enunciated by James L.J. in, applied by Kekewich J. MILNER'S SAFE COMPANY *v.* GREAT NORTHERN AND CITY RAILWAY COMPANY
[1907] **1 Ch. 208**

CHARGE—Estate duty—Marriage settlement—Charging sum on death of settlor– **385**
See REVENUE. 1.

—— Trustee—Breach of trust—Charge on share of beneficiary—Constructive notice—Duty to investigate assignee's title—Relief – – – – – **356**
See TRUSTEE. 1.

CHARITY — *School for Education of Poorer Classes—Trust Deed—Denominational Teaching — Discontinuance of Week-day School after Will, but before Death of Testatrix—Continued user as Sunday School — No Lapse — Will — Legacy to Charitable Institution.*

Testatrix bequeathed a legacy to "St. Andrew's School, Heybridge," for the benefit thereof. A school of that name was founded by a brother of the testatrix in 1869 for the education of children of the poorer classes, the religious part of the education to be according to the principles of the Church of England. From the date of its foundation this school had been used for the purposes of a Church of England elementary day school on week-days, and of a Sunday school in connection with Heybridge parish church on Sundays, and was so used at the date of the will. For some years previous to the testatrix's death, however, this week-day school had been discontinued, having lost the Government grant, and the school-house had not been used for any other day school under the trusts of the deed of settlement, but it continued to be used for the Sunday school uninterruptedly down to the present time :—

Held, that the legacy had not lapsed, for although the purposes for which the school was founded had to a great extent failed, yet there had not been, so to speak, a "total loss" of the institution, inasmuch as it still survived in the Sunday school and performed its objects on one day in the week. *In re* WARING. HAYWARD *v.* ATTORNEY-GENERAL – **Kekewich J. 166**

2. —— *Vicar and Churchwardens to be applied "as they shall think fit," Gift to — Validity — Will.*

A testatrix bequeathed 400*l.* to the vicar and churchwardens for the time being of K. to be applied by them in such manner as they shall in their sole discretion think fit :—

Held, that the bequest was a good charitable gift for ecclesiastical purposes in the parish. *In re* GARRARD. GORDON *v.* CRAIGIE **Joyce J. 382**

CLASS — Aliquot shares — Residue — Forfeiture clause—Mode of division – – **391**
See WILL. 4.

—— Next of kin according to the Statute of Distribution — Time for ascertaining class – – – – – – **450**
See WILL. 3.

—— Severance of class — Married woman — Restraint on anticipation—Rule against perpetuities – – – – **276**
See HUSBAND AND WIFE.

CLERGY RESIDENCES REPAIR.
See under ECCLESIASTICAL LAW.

COMPANY — *Capital, Return of — Income or Capital—Tenant for Life and Remainderman—Special Resolution—Retrospective and Prospective Effect—Companies Act*, 1880 (43 *Vict. c.* 19), *ss.* 3, 4, 5.

A testator gave his residuary real and personal estate to trustees upon trust for certain persons for life, with remainders over. His estate comprised fully-paid shares in the S. Company. In each year from 1894 to 1906, the company returned to its shareholders out of profits available for dividends a part of the capital paid up on their shares, increasing the unpaid capital by the same amount. These returns purported to be made under the Companies Act, 1880, but no special resolution was passed until 1905. In that year a special resolution was passed that 7*s.* 6*d.* per share should be so returned in that year, that all similar returns in past years should be confirmed, and that the directors should be authorized to make similar returns in the future :—

Held, that the special resolution was invalid so far as it purported to have a retrospective or prospective effect, and valid only so far as concerned the return made in 1905 ; and that the rule to be inferred from *Bouch* v. *Sproule*, (1887) 12 App. Cas. 385, and other cases is that a tenant for life is entitled to all payments made out of profits in respect of shares in a company except such as have been validly capitalized by the company. All the returns except the 7*s.* 6*d.* per share in 1905 were therefore payable as income to the tenants for life. *In re* PIERCY. WHITWHAM *v.* PIERCY – – – **Neville J. 289**

2. —— *Memorandum of Association—Alteration of Objects—Extension to New Business—Powers of Court—Companies (Memorandum of Association) Act*, 1890 (53 *&* 54 *Vict. c.* 62), *s.* 1, *sub-s.* 5, *clauses* (*a*) *and* (*d*).

The alteration in the memorandum of association contemplated by s. 1, sub-s. 5, clause (*a*), of the Companies (Memorandum of Association) Act, 1890, is an alteration which will leave the business of the company substantially what it was before, with only such changes in the mode of conducting it as will enable it to be carried on more economically or more efficiently.

The memorandum of association of a club, incorporated as a limited company, stated that its objects were to promote, assist, and protect the use of bicycles, tricycles, and other similar vehicles on the public roads, to provide legal

assistance for their riders in the enforcement of their rights to use the public roads ; and to promote the comfort and safety of its members while touring on bicycles and tricycles by collecting and furnishing information, and in other ways. On an application by the club, under the provisions of the Companies (Memorandum of Association) Act, 1890, for the sanction of the Court to resolutions altering its memorandum of association by admitting to its membership all tourists, including motorists :—

Held, that the proposed alteration did not fall within either clause (*a*) or clause (*d*) of s. 1, sub-s. 5, of the Act, and ought not therefore to be sanctioned by the Court. *In re* CYCLISTS' TOURING CLUB - - **Warrington J. 269**

3. —— *Receiver and Manager—Borrowing Powers—Authority to borrow limited Sum for general Purposes of the Business — Limit exceeded—Indemnity—Creditors of Manager—Debenture-holders—Priority.*

Orders were made in a debenture-holders' action appointing a receiver and manager, and authorizing him to borrow 3000*l.* for the general purposes of the business, this sum to be a first charge on the assets. The company was ordered to be wound up. The manager carried on the business, borrowed 3000*l.* from a bank, incurred other debts, and overdrew his account with the bank to the extent of 1500*l.* beyond the 3000*l.*, but made no further application for leave to raise money. He retired from his office, and the debenture-holders applied for a declaration that he was not entitled to any indemnity out of the assets of the company in respect of liabilities incurred beyond the 3000*l.* His creditors claimed that he was entitled to an indemnity, and that they ought to that extent to be paid out of the assets. The application came before Warrington J., who held that the order authorizing the receiver and manager to borrow a limited sum for the general purposes of the business had not deprived him of his right to be indemnified out of the assets ; that, if without any application to the Court, he had incurred further liabilities, he was only entitled to be indemnified in respect of them so far as he could shew that, having regard to all the circumstances, he was justified in incurring them without leave ; that this must be separately determined in each case ; and that it would not be enough for him to shew that the further liabilities had been incurred bona fide and in the ordinary course of business.

The case is reported [1906] 1 Ch. 497.

The matter then went back to chambers on inquiries which had been directed by a previous order, and questions now came before the Court whether the receiver was entitled to be indemnified (1) in respect of bodies supplied for motor-cars which had been ordered by customers either before or after his appointment ; (2) bodies supplied to him for cars which had been prepared for a motor show ; (3) rent of business premises ; and (4) the 1500*l.* overdrawn with the bank :—

Held, that inasmuch as the receiver had reasonable ground for believing that he would

be able to discharge the liabilities out of the purchase-moneys of the cars, and it would not have been practicable to apply to the Court, he ought to be indemnified in respect of (1) and (3) ; that the motor bodies supplied for the show were ordered as a speculation, so there should be no indemnity in respect of (2) ; that, although the 1500*l.* overdraft had all been spent on payments which were necessarily made to keep the business going, there was no reason why the receiver should not have applied to the Court for leave to make these payments, and he was therefore not entitled to an indemnity in respect of (4). *In re* BRITISH POWER TRACTION AND LIGHTING COMPANY. HALIFAX JOINT STOCK BANKING COMPANY *v.* BRITISH POWER TRACTION AND LIGHTING COMPANY (No. 2) **Warrington J. 528**

4. —— *Shares—Transfer to Infant Nominee—Winding-up—Contributories.*

At the commencement of the voluntary winding-up of a company, in 1893, S. was the registered holder of twenty shares therein, which in April, 1894, he transferred to L. The liquidator, in pursuance of the power given to him by s. 131 of the Companies Act, 1862, sanctioned the transfer and entered the name of L. as holder of the shares in the register of members. In May, 1894, L. transferred the shares, with the sanction of the liquidator, to D., who after a time was registered as holder of the shares.

The shares were part of a batch of shares purchased from S. by M. & G. (stockbrokers) on the market with a view to a resale, and L., who was their nominee, was a clerk in their employment, and was an infant at the time of the transfers to and by him. D. was also an infant when he became transferee, and this fact was known to the liquidator in 1896, if not earlier.

In 1896, after calls had been made on the shares, but not paid, the liquidator applied that the names of M. and G. might be substituted for that of D. in the register of members and the list of contributories :—

Held, that, as there was no contractual relation, in respect of the shares, between the company and M. and G., the principle of *King's Case*, (1871) L. R. 6 Ch. 196, applied, and M. and and G. could not be placed on the register or list.

Pugh and Sharman's Case, (1872) L. R. 13 Eq. 566, and *Richardson's Case*, (1875) L. R. 19 Eq. 588, distinguished.

Semble, that any equity which the liquidator might have had against L., by reason of the transfer by him to an infant, was abrogated by the laches of the liquidator. *In re* NATIONAL BANK OF WALES, LIMITED. MASSEY AND GIFFIN'S CASE - - - **Parker J. 582**

5. —— *Voting — Proxy — Stamp — Date of Meeting uncertain—Blanks in Proxy—Authority to fill up Blanks—Meeting of Shareholders—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 80.

Provided a proxy be stamped with a penny stamp on execution, the date of execution and the date of the meeting at which it is to be used may be filled in afterwards by any person duly

COMPANY—*continued.*
authorized by the giver of the proxy to do so; even though at the time of execution the date of the meeting has not been fixed. SADGROVE *v.* BRYDEN – – – – **Parker J. 318**

—— Brewery company.
See under BREWERY COMPANY.

—— Dividends on shares—Company's articles—Express stipulation against apportionment – – – – – **399**
See APPORTIONMENT.

—— Railway company.
See under RAILWAY.

COMPENSATION — Copyholds — Enfranchisement—Fines – – – – **38**
See LANDS CLAUSES ACTS.

—— Licence, Non-renewal of—Capital moneys—Investment—Powers of debenture trustees – – – – – **64**
See BREWERY COMPANY.

COMPROMISE — Periodical payments — Compromise for lump sum—Apportionment—Payment out of capital of estate. **30**
See SETTLEMENT.

CONCURRENT ACTIONS — Conduct of proceedings—Practice – – – **482**
See ADMINISTRATION. 2.

CONDITIONS—Bequest on—Forfeiture—"Residence"—"Unmarried" – – **231**
See WILL. 5.

CONDUCT OF PROCEEDINGS — Concurrent actions—Practice – – – **482**
See ADMINISTRATION. 2.

CONFLICT OF LAWS—*Power of Appointment—Personalty—Execution—Foreign Domicil—Unattested Will—Extrinsic Evidence of Intention—Wills Act*, 1837 (1 *Vict. c.* 26), *ss.* 9, 10, 27.
Appeal from the decision of Kekewich J., [1905] 2 Ch. 408. On the case being called, counsel informed the Court that the parties, who were sui juris, had agreed to a settlement, and an order was made in the terms which had been agreed. *In re* SCHOLEFIELD. SCHOLEFIELD *v.* ST. JOHN – – – – – **C. A. 664**

CONSOLIDATION ORDER — Costs — Set-off — Independent proceedings – – **428**
See MORTGAGE. 1.

CONSTRUCTIVE NOTICE.
See under NOTICE.

CONTINGENT FUTURE LIABILITIES—Return of assets—Rights of future creditor—Distribution—Practice – – **72**
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CONTRACT—Vendor and purchaser.
See under VENDOR AND PURCHASER.

CONTRIBUTORY—Company—Shares—Transfer to infant nominee—Winding-up—Contributories – – – – **582**
See COMPANY. 4.

CONVERSION—Mortgage—Surplus proceeds of sale—Realty or personalty—Lunacy of mortgagor – – – – **313**
See MORTGAGE. 5.

—— Reversionary interest in land—Woman married before the Act—Accruer of title – – – – – – **475**
See WILL. 9.

—— Trust for conversion—Mining lease—Payments in nature of royalties—Capital or income – – – – – **159**
See SETTLED ESTATE.

CONVEYANCE—*Reservation—Exception—"All Mines and Veins of Coal"—Underground Road—Carriage of Foreign Minerals—Property in Subsoil—Payment of Rent—Mistake—Estoppel—Construction.*
The predecessors in title of the defendants were owners in fee simple of land, including both the surface and the strata below the surface. They conveyed the land to the plaintiff's predecessors by a deed which contained an exception and reservation of "all mines and veins of coal in or under" the land. The defendants and their predecessors worked the coal mines under the land and made an underground road, which was not confined to the seams of coal, but was cut also through the adjacent strata. Along this road they carried coal obtained from mines beyond the limits of the land conveyed to the plaintiff's predecessors:—
Held that, by virtue of the exception, the property in the strata below the surface remained in the defendants sufficiently to entitle them to construct roads therein and use them in any way they pleased.
Proud v. *Bates*, (1865) 34 L. J. (Ch.) 406; *Duke of Hamilton* v. *Graham*, (1871) L. R. 2 H. L. Sc. 166; and *Eardley* v. *Granville*, (1876) 3 Ch. D. 826, followed.
Ramsay v. *Blair*, (1876) 1 App. Cas. 701, distinguished.
The defendants and their predecessors had for some years paid rent to the plaintiff in the belief that they were bound to do so under a licence from the plaintiff:—
Held that this, being a voluntary payment made under a supposed legal liability, created in law no obligation at all, and that the defendants were not thereby estopped from setting up their title under the conveyance. BATTEN POOLL *v.* KENNEDY – – – **Warrington J. 256**

COPYHOLDS—Compensation—Enfranchisement—Fines – – – – – **38**
See LANDS CLAUSES ACTS.

COPYRIGHT—*Book—Posthumous Letter—Proprietorship of Copyright—Author's Manuscript—Assignment—Right to prevent Publication—Copyright Act*, 1842 (5 & 6 *Vict. c.* 45), *s.* 3.
Although at common law the writer of a letter and his legal personal representatives are entitled to prevent its publication, and this is a right of property, the copyright in a letter published after the death of the writer is vested by the Copyright Act, 1842, in the proprietor of the

COPYRIGHT—*continued.*

letter itself—*i.e.*, of the paper and the writing upon it.

The proprietors of unpublished manuscripts, written by an author long deceased, assigned to S. E. & Co., in 1895, "all copyright which we possess and the exclusive right of publishing the entire collection of letters," S. E. & Co. "undertaking to return to us all the MSS. when copied." S. E. & Co. copied the letters, published them in 1898, and returned the originals to the assignors. The defendant subsequently purchased the originals from the assignors, with any rights which they might still have therein. He also took from the legal personal representative of the deceased author an assignment of the copyright and all other rights of the author in the letters. S. E. & Co. were now registered as owners of the copyright:—

Held, that by the assignment S. E. & Co. had become proprietors of the author's manuscript so as to enable them by first publication to obtain the copyright in the letters, and that they were entitled to an injunction restraining the defendant from publishing the letters.

Decision of Kekewich J., [1906] 1 Ch. 101, affirmed. MACMILLAN & Co. *v.* DENT

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2. —— *Registration—Musical Composition—Agreement—Author and Publisher—Assignment—Entry on Register—Application to Expunge—Practice—Appeal—Copyright Act*, 1842 (5 & 6 *Vict. c.* 45), *ss.* 2, 13, 14.

In July, 1900, J., who was the author of, and registered proprietor of the copyright in, certain musical compositions published in a series under the title of "Music and the Higher Life," entered into an agreement with N., the managing director of a publishing company, whereby, in consideration of J. giving to N. the sole and exclusive right of printing and publishing the series of "Music and the Higher Life," and issuing the same in volume form, N. and J. jointly agreed that—(1.) the cost of printing and issuing the volume should be borne by N.; (2.) N. should pay to J. 6*d.* on every copy sold; (3.) N. should supply J. with such copies as he may require at 1*s.* 6*d.* per copy, any copies supplied to J. not to be liable to the royalty of 6*d.* N. subsequently assigned his rights under the agreement to the publishing company. That company afterwards published two other series of musical compositions by J., entitled respectively "The Liedertafel Series" and "The Preacher-Musician Series," and also a work entitled "Music and the Higher Life (abridged edition)," which contained thirty-six numbers from the original series, seven numbers from "The Liedertafel Series," and two numbers from "The Preacher-Musician Series."

In 1903 the publishing company registered themselves as proprietors of the copyright in "Music and the Higher Life (abridged edition)," and also of the copyright in "The Liedertafel Series" and "The Preacher-Musician Series," claiming to be entitled to do so on the ground that the copyright in the compositions forming the series "Music and the Higher Life" had been assigned to N. by the agreement in July, 1900, and that it had been agreed in writing by J., that the terms contained in that agreement should also apply to the "Liedertafel" and "Preacher-Musician" series. They also alleged that all the three registrations had been made with the oral consent of J.

On an application by J. under the Copyright Act, 1842, s. 14, to expunge these three entries from the register on the ground that he had not parted with the copyright, Kekewich J., [1906] 2 Ch. 595, ordered that they should be expunged:—

Held, that an appeal lay to the Court of Appeal from his decision, but

Held (affirming that decision), that the agreement of July, 1900, only passed the sole and exclusive right of printing and publishing the series called "Music and the Higher Life" in a particular form, namely, volume form, and did not amount to an assignment of the copyright in the compositions forming that series; and that, there having been no assignment of the copyright in the above-mentioned works in writing by J. before the registration by the publishing company, that registration could not be regarded as an entry of an assignment of the copyright within s. 13 of the Copyright Act, 1842, and consequently that the publishing company were not entitled to be registered as proprietors of the copyright.

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COSTS — Counsel's fees—Three counsel—Taxation – – – – – – **607**
See PRACTICE.

—— Set off—Independent proceedings — Consolidation order – – – – **428**
See MORTGAGE. 1.

—— Solicitor—Will—Trustee—Power to charge for professional services — Non-professional service – – – – **58**
See SOLICITOR.

—— Specific performance—Interest on purchase-money – – – – – **590**
See VENDOR AND PURCHASER. 5.

COUNSEL—Costs—Counsel's fees—Three counsel—Taxation – – – – **607**
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COVENANT—Restraint of trade—Combination of firms—Separate businesses—Reasonableness – – – – – **322**
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—— Restraint of trade—Restricted area extending to the United Kingdom – **189**
See MASTER AND SERVANT

—— Water rate—Covenant by lessor to pay rates – – – – – **616**
See LANDLORD AND TENANT.

CREDITOR—Administration—Creditor's action —Attendance at proceedings—Leave to attend—Creditor not a party to the action – – – – – **719**
See ADMINISTRATION.

DEBENTURE—Licence—Non-renewal of—Compensation — Capital moneys — Investment—Powers of debenture trustees.
See BREWERY COMPANY. **64**

DEBENTURE-HOLDERS—Creditors of manager —Priority– – – – – **528**
See COMPANY. 3.

DEDICATION — Footway — Adjoining strip of land in lease — Whether termor can dedicate – – – – – **704**
See HIGHWAY.

DEED—*Misrepresentation as to Contents—Plea of Non est factum—Validity—Mortgage—Execution.*

A plea of non est factum is not proved by evidence of misrepresentation as to the contents of the deed where the person executing the deed knew that it dealt with the property to which it related.

The defendant, who was formerly the managing clerk to one H., a solicitor, acted as his nominee in a building speculation relating to the E. property, of which H. was owner. Shortly after leaving H.'s employment he was requested by H. to execute certain deeds, and on asking what those deeds were he was told by H., in whom he had complete confidence, that they were deeds transferring the E. property. The defendant thereupon signed them. One of the deeds so signed was a mortgage between the defendant, as mortgagor, of the one part and W. of the other part, and contained the usual covenant by the mortgagor for payment of principal and interest. In an action by the transferee of the mortgage for payment of the principal debt and interest, the defendant pleaded that the deed was not his deed, but was signed by him in consequence of a misrepresentation by H. as to its contents :—

Held, that the misrepresentation being only as to the contents of the deed known by the defendant to deal with the property, the plea of non est factum failed, and that the defendant was liable on the covenant.

Foster v. *Mackinnon*, (1869) L. R. 4 C. P. 704, distinguished.

National Provincial Bank of England v. *Jackson*, (1886) 33 Ch. D. 1, followed. HOWATSON *v.* WEBB – – – **Warrington J. 537**

DENTIST—Partnership—Articles—Construction —"Professional misconduct." – **420**
See PARTNERSHIP.

DEPOSIT — Railway — Parliamentary deposit—Special Act—No abandonment Act.
See RAILWAY. 2. **186**

DIRECTORS—Powers of — Influencing votes — Payments for proxy papers and stamps —Ultra vires. – – – – **5**
See RAILWAY. 3.

DISCRETION—Inquisition—Right of lunatic to traverse—Discretion of judge in lunacy.
See LUNACY. **1**

DISTRIBUTION—Contingent future liabilities—Return of assets—Rights of future creditor – – – – – **72**
See ADMINISTRATION. 1.

DISTRIBUTION, STATUTE OF — Next of kin according to the—Time for ascertaining class – – – – – **450**
See WILL. 3.

DIVIDENDS — Company's articles — Express stipulation against apportionment **399**
See APPORTIONMENT.

DOMICIL—Power of appointment—Personalty —Execution — Foreign domicil — Unattested will—Extrinsic evidence of intention – – – – – **664**
See CONFLICT OF LAWS.

DUTY—Inland revenue.
See under REVENUE.

EASEMENT — Ancient lights—Destruction of easement—Declaration that there is no easement – – – – – **678**
See LIGHT AND AIR.

—— Way, Right of.
See under WAY, RIGHT OF.

ECCLESIASTICAL LAW — *Vicarage — Sale — Purchase of new Vicarage with Proceeds—Loan of Balance of Purchase-money — Completion of Purchase—Mortgage of Revenues of Benefice to secure Loan — Validity — Lien — Clergy Residences Repair Act*, 1776 (17 *Geo.* 3, *c.* 53), *ss.* 1, 4, 10—*Parsonages Act*, 1838 (1 *& 2 Vict. c.* 23), *s.* 1.

Where under the provisions of the Clergy Residences Repair Act, 1776, and the Parsonages Act, 1838, money is borrowed by an incumbent upon the security of a mortgage of the revenues of his benefice, it is essential to the validity of the mortgage—(1.) that the money should be borrowed prospectively for the purpose of paying for future works to be executed, and not for the purpose of repaying money already expended ; and (2.) that the money should be paid into the hands of a nominee as required by s. 4 of the Act of 1776.

The incumbent of a living, finding that the vicarage house was too small for his requirements, sold it with the consent of the ordinary and patron, and the purchase-money was duly paid to the Governors of Queen Anne's Bounty. He subsequently found a house more suitable for the purpose, and the purchase of it was approved by the Governors of Queen Anne's Bounty and by the ordinary and patron. The money in the hands of Queen Anne's Bounty being insufficient to provide the purchase-money, it was arranged that the incumbent should find the balance. This he accordingly did by means of a personal loan from members of his own family, and sent a cheque for the balance to Queen Anne's Bounty, and shortly afterwards

ECCLESIASTICAL LAW—*continued.*

the purchase was completed. About a year after its completion the incumbent obtained from the ordinary his approval and consent to a mortgage of the revenues of the benefice in favour of the lenders, and that approval and consent were expressed in a memorandum of approval duly executed by the ordinary. A few days later a mortgage in the form scheduled to the Act of 1776, adapted to the case of a purchase, was executed by the incumbent. It purported to charge the whole revenues of the benefice with the repayment to the lenders of the money advanced by annual instalments of principal and interest as provided by the Acts. The incumbent subsequently exchanged his benefice for another, and, the new incumbent finding the vicarage house too large, it was sold and a new vicarage house bought with a part of the proceeds of sale and the balance paid into the hands of the Governors of Queen Anne's Bounty :—

Held, that the mortgage having been executed to secure the repayment of money already expended, and the money not having been paid into the hands of a nominee as required by s. 4 of the Act of 1776, the mortgage was not in accordance with the Acts, and was, therefore, invalid.

Held, also, that the mortgagees had no lien on the new vicarage or on the balance in the hands of the Governors of Queen Anne's Bounty. LIDBETTER *v.* HATCH – **Warrington J. 404**

—— Charity—Gift to vicar and churchwardens to be applied "as they shall think fit"—Validity – – – – **382**
See CHARITY. 2.

EDUCATION.
See under SCHOOLS.

ENFRANCHISEMENT— Compensation — Copyholds—Fines – – – – **38**
See LANDS CLAUSES ACTS.

EQUITABLE JURISDICTION—Contract of unregistered money-lender—Void transaction—Usury – – – – **300**
See MONEY-LENDER.

EQUITABLE MORTGAGES.
See under MORTGAGE.

ESTATE DUTY.
See under REVENUE.

ESTATE PUR AUTRE VIE—Reversion in settlor—Power of tenant for life to sell fee **46**
See SETTLED LAND. 4.

—— Trustees with estate pur autre vie—Limited owners with powers of life tenant—Non-beneficial owners – – **629**
See SETTLED LAND. 3.

ESTOPPEL — Mistake — Property in sub-soil—Payment of rent – – – **256**
See CONVEYANCE.

EVIDENCE—Dentist—Report of dental committee—Admissibility – – **420**
See PARTNERSHIP.

EVIDENCE—*continued.*

—— Extrinsic evidence—Will—Construction—Subsequent acquisition of further real estate—Intestacy – – – **465**
See WILL. 10.

—— Power of appointment—Personalty—Execution—Foreign domicil—Unattested will—Extrinsic evidence of intention. **664**
See CONFLICT OF LAWS.

—— Scottish document registered in Scotland—Production in England impossible—Secondary evidence of contents. **590**
See VENDOR AND PURCHASER. 5.

EXECUTION — Deed — Misrepresentation as to contents—Plea of non est factum—Validity—Mortgage – – – **537**
See DEED.

—— Power of appointment — Personalty — Foreign domicil — Unattested will — Extrinsic evidence of intention – **664**
See CONFLICT OF LAWS.

EXECUTORS—*No Next of Kin—Beneficial Title to Residue—Equal Pecuniary Legacies to all the Executors—Unequal Specific Legacies to none.*

In a case where there are no next of kin the executors are beneficially entitled to undisposed-of residue unless the will shews a contrary intention. It is settled law that such an intention will be inferred from the gift of a pecuniary legacy to a sole executor or of equal pecuniary legacies to all the executors. This inference will not be rebutted by the gift of specific legacies of unequal value to two out of three executors to all of whom equal pecuniary legacies are given. *In re* GLUKMAN. ATTORNEY-GENERAL *v.* JEFFERYS – – **Swinfen Eady J. 171**

FERRY—*Franchise—Ancient Ferry—Bridge—Traffic diverted from Ferry—Total Loss of Tolls—Disturbance of Ferry.*

The franchise of a ferry is not a grant of the exclusive right to carry across a stream by any means whatever, but only a grant of the exclusive right to carry across by means of the ferry.

Where, therefore, a bridge was constructed by private enterprise across a river near to an ancient ferry and connecting the same highways as the ferry, so that the public used the bridge to cross the river and entirely ceased to use the ferry, whereby the ferry owner lost all the income he used to receive from tolls on the ferry :—

Held, that the bridge was not a disturbance of the ferry, and that the ferry owner had no remedy.

Judgment of Blackburn J. on this point in *Reg.* v. *Cambrian Ry. Co.*, (1871) L. R. 6 Q. B. 422, 430, not followed.

Dictum of Mellish L.J. in *Hopkins* v. *Great Northern Ry. Co.*, (1877) 2 Q. B. D. 224, 230, approved and followed. DIBDEN *v.* SKIRROW **Neville J. 437**

FINANCE ACTS.
See under REVENUE.

FINES — Compensation — Copyholds — Enfranchisement – – – – – **38**
See LANDS CLAUSES ACTS.

FIXTURES—*Hire-purchase Agreement—Subsequent Equitable Mortgage—Priority.*

A company hired machinery, fixed on its business premises, from L. & H. on the terms of a hire-purchase agreement which provided that the company was to pay a monthly rent for the hire of the machinery, and should become the purchaser on payment of a certain sum, in which event credit would be given for the previous payments of rent. Until the purchase the company was to be a mere bailee of the machinery, and in case of default in making the monthly payments or breach of the conditions of the agreement L. & H. were empowered to enter and remove the machinery.

Subsequently the company gave to a bank an equitable mortgage of the business premises by a deposit of the deeds thereof, accompanied by a written charge under the common seal of the company containing an agreement to give a legal mortgage on demand. The bank took without notice of the hire-purchase agreement. The company failed to pay the instalments and committed breaches of the conditions of the hire-purchase agreement; L. & H. demanded delivery up of the machinery, and a winding-up order was made against the company. The principal secured to the bank was due, with an arrear of interest:—

Held, that, the bank being merely an equitable mortgagee, and L. & H. having an equitable interest in the machinery under their hire-purchase agreement, the interest under that agreement had priority over the interest of the bank.

Gough v. *Wood & Co.*, [1894] 1 Q. B. 713; *Hobson* v. *Gorringe*, [1897] 1 Ch. 182; and *Reynolds* v. *Ashby & Son*, [1903] 1 K. B. 87; [1904] A. C. 466, distinguished. *In re* SAMUEL ALLEN & SONS, LIMITED – **Parker J. 575**

FOOTWAY—Adjoining strip of land in lease—Whether termor can dedicate – **704**
See HIGHWAY.

FORECLOSURE.
See under MORTGAGE.

—— Stamps—Foreclosure order before 1898 **249**
See REVENUE. 3.

FOREIGN DOMICIL—Unattested will—Extrinsic evidence of intention — Power of appointment—Personalty—Execution.
See CONFLICT OF LAWS. **664**

FORFEITURE—Class gifts — Aliquot shares—Residue—Mode of division – **391**
See WILL. 4.

—— "Residence"—"Unmarried"—Bequest on conditions – – – – **231**
See WILL. 5.

FRANCHISE—Ancient ferry — Bridge — Traffic diverted from ferry—Total loss of tolls.
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FRAUD—Solicitor—Trustee—Breach of trust—Relief—Duty to investigate assignee's title—Constructive notice – **356**
See TRUSTEE. 1.

GRANT—Way, right of—Implied grant—Extent of right—User for domestic and business purposes – – – – – **208**
See WAY, RIGHT OF.

HERIOT—*Freehold of Manor—Tenant—"Dying seised"—Mortgage—Mortgagor in Possession.*

A mortgagor in possession of a freehold tenement within a manor is so "seised" of that tenement that, on his death, the lord of the manor is entitled to claim his best beast as a heriot, pursuant to the custom of the manor. COPESTAKE *v.* HOPER – – **Kekewich J. 366**

HIGHWAY—*Footway—Adjoining Strip of Land in Lease—Whether Termor can Dedicate—Presumption as to Freeholder's Assent—User of Subtenants inconsistent with Dedication.*

In April, 1813, a freeholder demised building land to C. for a term of eighty-two years, and C. contracted with L. to erect a number of shops on a part of the land that fronted a highway. The plans submitted by L. to the local authority shewed that the proposed building line of the shops left a strip of land, three feet in width, between the front wall of the shops and the public footway. The local authority informed L. that his plans were approved subject to the strip of land being given up to form part of the public footway. L., without replying, commenced to build, and, on completing the shops in September, 1883, applied to the local authority to pave the footway in front of his shops right up to the building line. They replied that, on the strip of land being given up as above stated the footway would be paved. L. did not reply, but allowed them to pave the strip of land right up to the wall of the shops, no line of demarcation being made separating it from the footway. In the meantime C., who had no knowledge of L.'s communications with the local authority, had granted L. separate underleases of the shops for eighty years, and had also assigned to him for value the head lease. In 1898 C. repurchased the head lease for value from L.'s successors in title, and in 1904 the freeholder died. In an action by C. and the assignees for value of some of the underleases to restrain the defendants from taking up the pavement of the strip of land, on the ground that it was private property, the defendants justified their acts on the ground, amongst others, that the strip of land had been dedicated to the use of the public since 1883, and was part of the public footway:—

Held, that there had been no dedication to the public, for that under the circumstances the consent of the freeholder could not be presumed.

Held, also, that the continuous user of the paved strip by the undertenants of the shops for the purpose of exhibiting their goods for sale rebutted dedication.

Held, also, that L. could not dedicate for the term of the head lease, dedication for a term being unknown to the law of England; it must be in perpetuity.

Dictum of Byles J. on this point in *Dawes* v. *Hawkins*, (1860) 8 C. B. (N.S). 848, 858, adopted. CORSELLIS *v.* LONDON COUNTY COUNCIL **Neville J. 704**

HIRE-PURCHASE AGREEMENT — Subsequent equitable mortgage—Priority – **575**
See FIXTURES.

HUSBAND AND WIFE—*Restraint on Anticipation—Married Woman—Rule against Perpetuities—Severance of Class.*

A testator directed his trustees to stand possessed of and invest a sum of 500*l.* and pay the income arising from such investment to his daughter S. S. during her life, and after her death upon trust for such child or children of the said S. S., or such child or children of a son or daughter of the said S. S. who should die before her as should if a son attain the age of twenty-one years, or if a daughter attain that age or marry; "and as to the share or shares of any girl or girls for her or their separate use, without power of disposing of the income or capital thereof otherwise than by will." S. S. survived the testator, and died leaving two married daughters who were born in the testator's lifetime:—

Held, that the restraint upon anticipation was severable and was valid as to the shares of the two daughters born in the testator's lifetime.

Herbert v. *Webster*, (1880) 15 Ch. D. 610, and *In re Ferneley's Trusts*, [1902] 1 Ch. 543, followed.

In re Ridley, (1879) 11 Ch. D. 645, not followed.

In re Russell, [1895] 2 Ch. 698, applied.
In re GAME. GAME *v.* TENNENT
Warrington J. 276

—— Reversionary interest in land—Woman married before the Act—Conversion
See WILL. 9. **475**

INCOME — Annuity — Direction to pay out of income — Continuing charge on income – – – – – **714**
See ANNUITY. 1.

—— Annuity—Will—Direction to pay out of income—Alternative gift – – **132**
See ANNUITY. 2.

—— Capital on income—Payments in nature of royalties – – – – – **159**
See SETTLED ESTATE.

INCUMBRANCES — Discharge—Settled land—Expenses of paving street—Payment by tenant for life – – – – **67**
See STREET.

—— Life tenant—Subsisting accumulation trust for discharge of incumbrances—Void trust for purchase of land – – **535**
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INDEMNITY—Company—Receiver and manager—Borrowing powers—Limit exceeded
See COMPANY. 3. **528**

—— Refusal of purchaser to accept indemnity—Small contingent incumbrance – **244**
See VENDOR AND PURCHASER. 3.

INFANT — Company — Shares — Transfer to infant nominee—Winding up—Contributories – – – – – **582**
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—— Purchase from mortgagee by father of infants—Liability to account – **195**
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INJUNCTION—Covenant in restraint of trade—Restricted area extending to the United Kingdom – – – – – **189**
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—— Restraint of trade.
See under RESTRAINT OF TRADE.

—— Trade name.
See under TRADE NAME.

—— Way, right of—Used for domestic and business purposes—Substitution of railway station – – – – – **208**
See WAY, RIGHT OF.

INLAND REVENUE.
See under REVENUE.

INQUISITION—Right of lunatic to traverse—Discretion of judge in lunacy – **1**
See LUNACY.

INSTALMENTS — Will — Legacy — Vesting — Intermediate income – – – **470**
See WILL. 8.

INTEREST— Mortgagor — Covenant — Payment of interest by one devisee—Acknowledgement – – – – **330**
See ADMINISTRATION. 4.

—— Specific performance—Interest on purchase-money – – – – – **590**
See VENDOR AND PURCHASER. 5.

INTERNATIONAL LAW.
See under CONFLICT OF LAWS.

INTESTACY—Will—Subsequent acquisition of further real estate—Extrinsic evidence
See WILL. 10. **465**

INVESTMENTS—Debenture trustees, Power of—Licence, Non-renewal of—Compensation—Capital moneys – – – **64**
See BREWERY COMPANY.

—— Power to retain investments—Hazardous securities—Tenant for life and remainderman – – – – – **22**
See WILL. 7.

—— Unauthorised securities—Express power to retain—Enjoyment in specie – **394**
See WILL. 6.

JUDICIAL TRUSTEES.
See under TRUSTEE.

JURISDICTION—Money-lender, contract of unregistered—Void transaction—Usury—Equitable jurisdiction – – **300**
See MONEY-LENDER.

JURISDICTION—*continued.*
—— Schools—Appeal by managers—Decision of Board of Education—Closing of schools *See* SCHOOLS. **504**

LACHES—Conveyance, Rectification of—Error in parcels—Common mistake – **564**
See VENDOR AND PURCHASER. 6.

LANDLORD AND TENANT—*Covenant by Lessor to pay Rates—"All Rates and Taxes payable in respect of the demised Premises"—Water Rate.*

The underlease of a shop and basement forming part of a large block of buildings contained a covenant by the lessor to procure to be paid "all rates and taxes payable in respect of the demised premises." Water was supplied for domestic purposes to the whole building and charged for in one rate which had been hitherto paid by the superior lessees :—

Held (affirming the decision of Buckley J., who felt himself bound by *Direct Spanish Telegraph Co.* v. *Shepherd*, (1884) 13 Q. B. D. 202), that the water rate was a "rate" within the meaning of this covenant which was payable by the lessor. BOURNE & TANT *v.* SALMON & GLUCKSTEIN, LIMITED – – – **C. A. 616**

LANDS CLAUSES ACTS—*Compensation—Copyholds—Enfranchisement—Fines—Lands Clauses Consolidation Act*, 1845 (8 *&* 9 *Vict. c.* 18), *ss.* 95, 96, 97.

Copyholds conveyed to a railway company by a conveyance subsequently enrolled under s. 95 of the Lands Clauses Consolidation Act, 1845, pass as freeholds on enrolment, but nevertheless, until enfranchisement by the company, they continue subject (inter alia) to fines payable on the deaths of the vendor and his successors before or after enrolment, and these fines must be included in the compensation for enfranchisement.

In re Wilson's Estate, (1862) 2 J. & H. 619, 623 ; (1863) 3 D. J. & S. 410, 417 ; *In re Marquis of Salisbury and London and North Western Ry. Co.* (1879), [1892] 1 Ch. 75, n. ; and *Lowther* v. *Caledonian Ry. Co.*, [1892] 1 Ch. 73, 82, 83, 85, applied. LORD LECONFIELD *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY **Swinfen Eady J. 38**

LAPSE—Residue—Aliquot shares—Class gifts—Forfeiture clause—Mode of division **391**
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—— Will—Legacy to charitable institution—Trust deed—No lapse – – – **166**
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LEASE—Footway—Adjoining strip of land in lease—Whether termor can dedicate
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—— Mining lease—Trust for conversion—Payments in nature of royalties—Capital or income – – – – – **159**
See SETTLED ESTATE.

LEGACY—Will.
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LETTER — Book — Posthumous letter — Proprietorship of copyright — Author's manuscript – – – – **107**
See COPYRIGHT. 1.

LICENSING ACTS—Compensation—Debenture trust deed—Capital moneys—Investment—Powers of debenture trustees
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LIEN—Vicarage—Sale—Purchase of new vicarage with proceeds—Loan – – **404**
See ECCLESIASTICAL LAW.

LIGHT AND AIR—*Ancient Lights—Easement—Rebuilding of Dominant Tenement—Alteration of Easement—Diminution of Light by Owner—Burden on Servient Tenement—Destruction of Easement—Declaration that there is no Easement.*

Where before the rebuilding of premises having ancient lights a partial interference with these lights by the owner of the servient tenement would not be sufficient to entitle the owner of the dominant tenement to an injunction, the same amount of interference, even though completely blocking up the remnant of ancient light left after the rebuilding, will not be an actionable wrong to be restrained by injunction.

Colls v. *Home and Colonial Stores, Ld.*, [1904] A. C. 179, applied.

Decision of Warrington J., [1906] 2 Ch. 544, affirmed on the facts. ANKERSON *v.* CONNELLY **C. A. 678**

LIMITATIONS, STATUTES OF—Mortgagor—Covenant—Payment of interest by one devisee—Acknowledgment – **330**
See ADMINISTRATION. 4.

—— Real property subject to trust for conversion, Mortgage of – – – **686**
See MORTGAGE. 4.

LONDON—*Buildings—Party Wall—Statutory Notice by Building Owner—"Adjoining Owner"—Various Interests in adjoining Premises—London Building Act*, 1894 (57 *&* 58 *Vict. c. ccxiii.*), *s.* 5, *sub-s.* 29, 32 ; *ss.* 90, 173.

The expression "adjoining owner" in s. 90 of the London Building Act, 1894, as defined by sub-ss. 29 and 32 of s. 5 of the Act, means every person holding an interest in the adjoining premises other than tenants from year to year or at will. A building owner, therefore, must serve his statutory notice under s. 90 upon every such person ; except that, where a class of persons, such as joint tenants or tenants in common, are entitled to a particular interest in the adjoining premises notice on one of the class will be sufficient.

List v. *Tharp*, [1897] 1 Ch. 260, discussed. CROSBY *v.* ALHAMBRA COMPANY, LIMITED **Neville J. 295**

—— Will — Bequest — "Money invested in" Lambeth Waterworks Company — Ademption—Transfer of undertaking to Water Board – – – **665**
See WILL. 1.

LUNACY—*Inquisition—Traverse of Inquisition—Right of Lunatic to traverse—Discretion of Judge in Lunacy—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *s.* 101.

Upon the petition, under s. 101 of the Lunacy Act, 1890, of a person found by inquisition to be of unsound mind for leave to traverse the inquisition :—

Held, that leave to traverse the inquisition was a matter of right, but that this does not prevent the judge in lunacy from exercising such a control in the matter as may be necessary for the protection of the person and estate of the alleged lunatic by satisfying himself (e.g., by a personal interview) that the application is bona fide, and that the alleged lunatic is competent to exercise an act of volition upon the subject. *In re Cumming*, (1852) 1 D. M. & G. 537, applied. *In re* GILCHRIST – – – **C. A. 1**

—— Mortgage—Surplus proceeds of sale—Realty or personalty—Lunacy of mortgagor. *See* MORTGAGE. 5. **313**

MAINTENANCE—Will—Vesting gift to son at thirty-five — Discretionary trust for maintenance out of income – **180** *See* WILL. 11.

MANAGER—Company—Receiver and manager—Borrowing powers—Limit exceeded—Indemnity – – – – **528** *See* COMPANY. 3.

MANOR—Heriot—Freehold of manor—Tenant—"Dying seised"—Mortgage—Mortgagor in possession – – – **366** *See* HERIOT.

MANUSCRIPT — Book — Posthumous letter—Proprietorship of copyright—Author's manuscript – – – – **107** *See* COPYRIGHT. 1.

MARRIAGE SETTLEMENT. *See* under SETTLEMENT.

MARRIED WOMAN. *See* under HUSBAND AND WIFE.

MASTER AND SERVANT — *Combination of Firms—Separate Businesses — Engagement of Servant by Agent on behalf of Combination—Dismissal of Servant—Covenant in Restraint of Trade—Limit of Space—Restricted Area extending to the United Kingdom—Reasonableness—Injunction*

It is competent for a principal company and its subsidiary companies, all carrying on similar though separate businesses, to engage a servant through an agent for all of them on the condition that on the termination of his service with any one or more of them he shall not enter the employment of any firm engaged in a similar business within a reasonable limitation of space.

In such a case the limit of space may under the circumstances reasonably comprise the whole area of the United Kingdom. HENRY LEETHAM & SONS, LIMITED *v.* JOHNSTONE-WHITE Neville J. **189**

MASTER AND SERVANT—*continued.*

—— Covenant in restraint of trade—Combination of firms—Separate businesses—Reasonableness – – – **322** *See* RESTRAINT OF TRADE.

MEETINGS — Company — Voting — Proxy — Authority to fill up blanks—Stamp **318** *See* COMPANY. 5.

MEMORANDUM OF ASSOCIATION — Company. *See* under COMPANY.

METROPOLIS WATER — Will — Bequest — Ademption — "Money invested in" Lambeth Waterworks Company — Transfer of undertaking to Water Board – – – – – **665** *See* WILL. 1.

MINE—Minerals, Conveyance of land with—Adjoining railway the boundary—Highway—Parcels – – – **550** *See* VENDOR AND PURCHASER. 2.

—— Mining lease—Trust for conversion—Payments in nature of royalties—Capital or income – – – – – **159** *See* SETTLED ESTATE.

—— Underground road — Carriage of foreign materials—Property in sub-soil—Payment of rent—Estoppel – – **256** *See* CONVEYANCE.

MISCONDUCT — "Professional misconduct" — Dentist—Partnership — Articles—Construction – – – – – **420** *See* PARTNERSHIP.

MISREPRESENTATION — Contents of deed — Plea of non est factum—Validity **537** *See* DEED.

MISTAKE—Error in parcels — Rectification of conveyance—Laches – – – **564** *See* VENDOR AND PURCHASER. 6.

—— Property in sub-soil—Payment of rent—Estoppel – – – – *See* CONVEYANCE.

MONEY-LENDER — *Registration — Contract of unregistered Money-lender — Void Transaction—Usury—Action to recover Securities—No Offer to repay Advances—Equitable Jurisdiction—Terms—Money-lenders Act*, 1900 (63 & 64 *Vict. c.* 51), *s.* 2.

In an equitable action by a borrower to recover securities mortgaged to an unregistered money-lender the mortgagee will not be ordered to give up to the mortgagor the securities the subject of the mortgage except upon the terms that the mortgagor shall repay the money which has been advanced to him.

Quære, what would be the result of an action at common law for this purpose?

Authorities on the old usury law considered and applied. LODGE *v.* NATIONAL UNION INVESTMENT COMPANY. – Parker J. **300**

MORTGAGE—*Foreclosure—Order Nisi for foreclosure on a principal Charge and Four supplementary Charges—Omission of Fifth supplementary Charge—Action for Foreclosure on the Six Charges—Res judicata—Practice—Costs—Set-off—Independent Proceedings—Consolidation Order—Rules of the Supreme Court, Order* LXV., *rr.* 14, 27, *sub-r.* 21.

The defendant charged her property with repayment of 100*l.* and interest to the plaintiff, and subsequently gave him four supplementary charges to secure further advances. She then gave him another supplementary charge to secure a further advance and his professional costs. The plaintiff brought an action on the first five charges, omitting the sixth, which was mislaid, and obtained an order for foreclosure nisi. He afterwards found the sixth charge, and applied for an order extending the relief to that charge, but his application was dismissed with costs. He then brought a fresh action for foreclosure on all the six charges. The defendant took out a summons asking that the proceedings might be stayed on the ground that the plaintiff was estopped by the foreclosure order :—

Held, by Warrington J., that the subject-matter of the fresh action was not the same as that in the first action, and that in the circumstances the plaintiff was not estopped from setting up his present case, and that the defendant's application must be dismissed with costs.

The costs payable to the defendant in the first action having been taxed, an order was made by the Master consolidating the two actions, giving relief by way of foreclosure nisi in respect of the six charges, and ordering taxation of the costs in both actions.

The plaintiff then applied that the costs payable to him under the order of Warrington J. might be directed to be set off against the costs payable by him in the first action :—

Held, by Parker J., following *David* v. *Rees*, [1904] 2 K. B. 435, that the provisions, as to set-off of costs, of Order LXV., rr. 14, 27, sub-r. 21, had no application to costs in independent proceedings ; and that, notwithstanding the consolidation order, the costs were in independent proceedings ; that, as under the practice before those rules there could be no set-off in independent proceedings otherwise than subject to the solicitor's lien for costs, the plaintiff's application must be dismissed with costs, but that these costs could be set off against the costs under the consolidation order. BAKE *v.* FRENCH

Warrington J. ; Parker J. 428

2. —— *Purchase from Mortgagee by Father of Infants—Liability to Account.*

J. by will gave N. House and M. House to his daughter S., the wife of O., for life, with remainder to their children as tenants in common, and gave B. House, W. House, and Y. House to the children of J. J. equally. At the death of J. the children were infants, and N. House, M. House, and B. House were comprised in a single mortgage to X. to secure 1350*l.*, while W. House and Y. House were subject to several mortgages to other persons. S. and O. and J. J. determined that, to give effect to the will, the mortgage debt of 1350*l.* should be

MORTGAGE—*continued.*

apportioned between N. House and M. House on the one hand and B. House on the other. O. and J. J. communicated with X., the mortgagee, and it was arranged that N. House and M. House should be purchased by O., and B. House, W. House, and Y. House by J. J. for amounts equal to the sums due on the mortgages, there being no valuation or bargaining, or evidence of the previous intention of the mortgagees to sell, although the power to sell had become exercisable. O. at once began to look out for sub-purchasers of N. House and M. House, and in March, 1880, a sub-purchaser of N. House having been found to buy it, O. raised the balance of the purchase-money payable by him on a mortgage of M. House. On completion the properties were conveyed to O. and J. J. respectively in the manner and with the recitals usual in the case of mortgagees selling under their powers of sale, and O. conveyed N. House to the sub-purchaser and mortgaged M. House for the balance. The value of the two houses was at least 1580*l.*, whereas O. paid only about 1246*l.* for them. S. died in 1882 :—

Held (applying the principles of *Keech* v. *Sandford*, (1726) Sel. Cas. 61 ; 2 W. & T. 7th ed., p. 693), that O. was a trustee of N. House and M. House (subject to the life interest of S.) for the children of O. GRIFFITH *v.* OWEN

Parker J. 195

3. —— *Real Estate—Equitable Mortgages—Legal Estate—Notice—Priority.*

A testator, after bequeathing legacies and annuities, devised his real estate to three trustees, of whom K. was one, upon trust out of the rents and profits in aid of his personal estate to pay his debts, funeral and testamentary expenses, and the said legacies and annuities, and, subject thereto, to hold the said premises upon trust as to a certain freehold house for K., his heirs and assigns. The testator then disposed of his residue. He died in March, 1872. In September, 1872, K. assigned his interest under the will by way of mortgage to a predecessor of the plaintiff, who gave notice to K.'s two co-trustees. In 1879, K., by the death of his co-trustees, became sole trustee of the will. In 1890 he deposited the title deeds and the probate of the will with the defendants, his bankers, and executed to them a memorandum of charge to secure an overdraft, and in 1903 he executed to the bank a conveyance of the hereditaments to which the title deeds related by way of mortgage to secure the existing debt and further advances. The defendants did not know, either in 1890 or 1903, of the plaintiff's equitable mortgage, but on the occasion of their first advance the bank manager examined the deeds without professional assistance. In 1890 all the debts, legacies, and annuities had been satisfied except a trust legacy of 100*l.* bequeathed to a tenant for life (who was still living) with remainder to her children. In an action to determine the priorities of the mortgagees :—

Held, that in 1903, the trusts of the will not having been fully executed, K.'s equitable interest had not become merged in his legal estate ; that the bank knowing K. to be the surviving trustee of the will, and having notice that what they took

MORTGAGE—*continued.*
from him was part of his trust estate, took it subject to all the subsisting trusts to which it was subject, including the mortgage of 1872, and therefore had not priority over the plaintiff's earlier equitable mortgage. PERHAM *v.* KEMPSTER – – – – – **Joyce J. 373**

4. —— *Real Estate subject to Trust for Conversion, Mortgage of—Rents and Profits of unconverted Real Estate—Payment into Court by Trustees under Trustee Act*, 1893—*Payment out—Application by Mortgagors—Terms imposed by Court—Money charged on Land—Proceeds of Sale of Land—Real Property Limitation Act*, 1833 (3 & 4 *Will.* 4, *c.* 27), *s.* 34—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8.

The only effect of s. 8 of the Real Property Limitation Act, 1874, is to bar the right of a mortgagee to bring an action to recover money charged on land after a lapse of twelve years.

Sect. 34 of the Real Property Limitation Act, 1833, which, where land is the subject-matter of a mortgage, provides for the extinguishment at the end of the period of limitation of the mortgagee's title, does not affect his title where the subject-matter of the mortgage is proceeds of the sale of land.

Kibble v. *Fairthorne*, [1895] 1 Ch. 219, discussed.

A testator, who died in 1878, by his will gave the residue of his real and personal estate to trustees upon trust to sell and convert at their discretion and to divide the proceeds among his four children in equal shares. At the date of his death the testator was possessed of a certain freehold house. The trustees, in exercise of their discretion, retained this property, and treated it as forming part of the testator's residuary trust estate. In 1889 two of the children mortgaged their interests in this property and "the proceeds thereof." In 1896 and 1905 the trustees paid into Court under the Trustee Act, 1893, certain sums representing the shares of the mortgagors in the rents and profits of this property. No part of the principal secured by the mortgage nor any interest thereon was ever paid, nor was any acknowledgment of the right thereto ever given by the mortgagors. On an application by the mortgagors for payment out to them of the fund:—

Held, that the Court would only sanction the payment out on condition that the mortgagors satisfied the mortgagees' claim for principal and interest under their mortgage.

In re Lloyd, [1903] 1 Ch. 385, applied. *In re* HAZELDINE'S TRUSTS – **Warrington J. 686**

5. —— *Sale—Surplus Proceeds of Sale—Trust in Favour of Mortgagor, his Heirs or Assigns—Conversion—Realty or Personalty—Lunacy of Mortgagor.*

The trust of surplus proceeds of sale in a mortgage deed provided that they should be paid to the mortgagor, "his heirs or assigns." The property was sold in 1900 under a power of sale contained in the mortgage, and there was a considerable surplus. The mortgagor was a lunatic not so found by inquisition for some

MORTGAGE—*continued.*
time before the sale, and continued in that condition until his death in 1906 intestate and without having been married:—

Held, that the surplus proceeds of sale must be treated as personalty notwithstanding the language of the trust. *In re* GRANGE. CHADWICK *v.* GRANGE – – – **Parker J. 313**

—— Acknowledgment — Mortgagor — Covenant —Payment of interest by one devisee —Testator's general estate – – **330**
See ADMINISTRATION. 4.

—— Deed—Misrepresentation as to contents—Plea of non est factum—Validity—Execution – – – – **537**
See DEED.

—— Heriot—Freehold of manor—Tenant—"Dying seised" Mortgagee—Mortgagor in possession – – – – **366**
See HERIOT.

—— Hire-purchase agreement — Subsequent equitable mortgage—Priority – **575**
See FIXTURES.

—— Life tenant — Trustees in possession — Powers of management – – **635**
See SETTLED LAND. 2.

—— Stamps—Foreclosure order before 1898
See REVENUE. 3. **249**

—— Vicarage—Sale—Purchase of new vicarage with proceeds—Loan—Mortgage—Lien
See ECCLESIASTICAL LAW. **404**

MUSICAL COMPOSITION—Copyright—Registration—Author and Publisher—Assignment – – – – – **651**
See COPYRIGHT. 2.

NAME—Trade name.
See under TRADE NAME.

NEXT OF KIN—According to the Statute of Distribution—Time for ascertaining class – – – – – **450**
See WILL. 3.

—— Executors—No next of kin—Beneficial title to residue – – – – – **171**
See EXECUTORS.

NON EST FACTUM—Plea of—Validity—Deed —Misrepresentation as to contents—Mortgage—Execution – – **537**
See DEED.

NOTICE—London building—Party wall—Statutory notice by building owner—"Adjoining premises"—Various interests in adjoining premises – – – **295**
See LONDON.

—— Mortgage — Equitable mortgages — Legal estate—Priority – – – **373**
See MORTGAGE. 3.

NOTICE—*continued.*

—— Rescission—"Without prejudice" – **244**
See VENDOR AND PURCHASER. 3.

—— Trustee—Constructive notice—Breach of trust—Duty to investigate assignee's title—Liability—Relief – – **356**
See TRUSTEE. 1.

OMNIBUS SERVICE—Railway company—Incidental powers—Ultra vires – **81**
See RAILWAY. 1.

PARCELS—Minerals, Conveyance of land with—Adjoining railway the boundary—Highway – – – – – **550**
See VENDOR AND PURCHASER. 2.

—— Written contract—Error in parcels—Common mistake—Rectification of conveyance—Laches – – – **564**
See VENDOR AND PURCHASER. 6.

PARLIAMENTARY DEPOSIT—Railway—Special Act—No abandonment Act **186**
See RAILWAY. 2.

PARSONAGES.
See under ECCLESIASTICAL LAW.

PARTIES—Administration—Contingent future liabilities—Return of assets—Rights of future creditor—Distribution – **72**
See ADMINISTRATION. 1.

PARTNERSHIP — *Articles — Construction — "Professional Misconduct"—Dentist—Evidence—General Council of Medical Education and Registration—Order of, erasing Name from Dentists' Register—Report of Dental Committee—Admissibility—Dentists Act*, 1878 (41 & 42 *Vict. c.* 33), *ss.* 13, 14, 15.

Articles of partnership between the plaintiff and the defendant, who were dentists, provided that if either partner should at any time during the continuance of the partnership be guilty of "professional misconduct," or of any act which was calculated to bring discredit upon or injure the other partner or the partnership business, the other partner should be at liberty to give notice in writing of his intention to determine the partnership.

The defendant gave the plaintiff notice of his intention to determine the partnership on the ground that the plaintiff had been guilty of "professional misconduct." The plaintiff thereupon brought an action claiming a declaration that the notice was invalid and that the partnership was still subsisting, and an injunction to restrain the defendant from acting upon the notice. The defendant in justification of the notice tendered in evidence an order of the General Medical Council, acting under the Dentists Act, 1878, directing the registrar to erase the name of the plaintiff from the Dentists' Register upon the ground that it had been proved that he had been guilty of conduct which was "infamous or disgraceful in a professional respect" within s. 13 of the Act, and also the

PARTNERSHIP—*continued.*

report of the Dental Committee upon which that order was based:—

Held, that neither the order nor the report was admissible in evidence upon the issue whether the plaintiff had been guilty of "professional misconduct" within the meaning of the articles.

Held, also, on the facts, that the plaintiff had not been guilty of "professional misconduct" within the meaning of the articles. CLIFFORD *v.* TIMMS – – – – **Warrington J. 420**

PARTY WALL — Statutory notice by building owner—"Adjoining premises"—Various interests in adjoining premises
See LONDON. **295**

PASSAGE—Way, Right of—User for domestic and business purposes—Substitution of railway station – – – – **208**
See WAY, RIGHT OF.

PAVING—Expenses of paving street—Payment by tenant for life—Incumbrances—Discharge – – – – – **67**
See STREET.

PAYMENT OUT—Mortgagors, Application by—Terms imposed by Court – – **686**
See MORTGAGE. 4.

—— Railway—Parliamentary deposit—Special Act—No abandonment Act – **186**
See RAILWAY. 2.

PERPETUITIES—Rule against—Married woman—Restraint on anticipation—Severance of class – – – – – **276**
See HUSBAND AND WIFE.

PERSONALTY—Realty or—Mortgage—Surplus proceeds of sale – – – **313**
See MORTGAGE. 5.

POSTMASTER-GENERAL — Telephone — Monopoly—Exceptions—Private lines – **621**
See TELEGRAPH.

POWER OF APPOINTMENT—Estate duty—Exercise of general power of appointment by will—Appointed fund—Residue – – – – – **284**
See REVENUE. 2.

—— Personalty—Execution—Foreign domicil—Unattested will—Extrinsic evidence of intention – – – – – **664**
See CONFLICT OF LAWS.

—— Trustees directed to pay and transfer the property to appointees—Deduction of title – – – – – – **695**
See VENDOR AND PURCHASER. 4.

—— Will — Exercise of general power of appointment—Gift of stocks, shares and securities – – – – **445**
See WILL. 2.

POWER OF SALE—Power given to "my trustees"—Power exercisable by survivor **475**
See WILL. 9.

POWER OF SALE—*continued.*
—— Settled land.
See under SETTLED LAND.

—— Vendor and purchaser.
See under VENDOR AND PURCHASER.

—— Vendor selling as trustee—No power of sale—Written request of beneficiaries before contract – – – – **238**
See VENDOR AND PURCHASER. 1.

POWERS — Directors—Influencing votes—Payments for proxy papers and stamps—Ultra vires – – – – – **5**
See RAILWAY. 3.

—— Railway company — Omnibus service — Incidental powers—Ultra vires – **81**
See RAILWAY. 1.

PRACTICE — *Costs — Counsel's Fees — Three Counsel—Taxation—Rules of Supreme Court, Order LXV., rr.* 8, 27, *sub-rr.* 29, 38.

Order LXV., r. 27, sub-r. 29, has not altered the practice of the Court with reference to a review of the taxing Master's decision on the allowance or disallowance of the fees of a third counsel employed by one of the parties in a case. The old authorities still apply; and in deciding whether the costs of three counsel ought to be allowed the Court can take into consideration the length of the documents that had to be examined, the length of time the case was likely to last, the fact that large sums are involved, and that the case is of commercial importance; but the commercial importance of the case, the importance of the issues, and the great public interests involved are not by themselves sufficient reasons for allowing the costs of a third counsel. PEEL *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY (No. 2)
Parker J. 607

—— Administration—Creditor's action—Attendance at proceedings—Leave to attend—Creditor not a party to the action **719**
See ADMINISTRATION. 3.

—— Concurrent actions—Conduct of proceedings – – – – – – **482**
See ADMINISTRATION. 2.

—— Parties — Contingent future liabilities — Distribution – – – – **72**
See ADMINISTRATION. 1.

—— Payment out—Mortgagors, Application by —Terms imposed by Court – **686**
See MORTGAGE. 4.

—— Specific performance—Interest on purchase-money—Costs – – – – **590**
See VENDOR AND PURCHASER. 5.

PRINCIPAL AND AGENT — Covenant in restraint of trade — Combination of firms — Separate businesses — Engagement by agent on behalf of combination—Reasonableness – – **322**
See RESTRAINT OF TRADE.

PRIORITY — Company — Debenture-holders — Creditors of manager – – **528**
See COMPANY. 3.

—— Hire-purchase agreement — Subsequent equitable mortgage – – – **575**
See FIXTURES.

—— Mortgages, Equitable — Legal estate — Notice – – – – – **373**
See MORTGAGE. 3.

PRIVATE INTERNATIONAL LAW.
See under CONFLICT OF LAWS.

PRIVATE STREETS.
See under STREET.

PROXY—Company—Meeting of shareholders—Voting—Proxy—Authority to fill up blanks—Stamp – – – – **318**
See COMPANY. 5.

—— Powers of directors—Influencing votes—Payments for proxy papers and stamps —Ultra vires – – – – **5**
See RAILWAY. 3.

PUBLIC HEALTH—Street, Expenses of paving —Payment by tenant for life—Incumbrances—Discharge – – – **67**
See STREET.

PUBLISHER—Author and—Copyright—Registration—Musical composition—Assignment – – – – – **651**
See COPYRIGHT. 2.

PURCHASER—Vendor and.
See under VENDOR AND PURCHASER.

RAILWAY — *Omnibus Service — Railway Company—Incidental Powers—Ultra Vires.*

A railway company owned a railway which ran from Liverpool to Birkenhead. For the convenience of passengers and intending passengers by the railway the company provided a service of motor omnibuses running between their Central Station at Birkenhead and the residential part of the town. They ran these omnibuses exclusively to and from the station in connection with their train service, but they picked up passengers on the way and carried them for any distance they pleased on the line of route, and charged separate fares for journeys between intermediate stopping places. The company had no express power under their special Acts to run omnibuses. In an action by the Attorney-General at the relation of the corporation of Birkenhead Warrington J. granted an injunction restraining the railway company from carrying on the business of omnibus proprietors in Birkenhead:—

Held (Buckley L.J. dissenting), that the omnibus business as carried on by the company was not incidental to the undertaking of the railway and was ultra vires; but the defendants undertaking (1.) to run their omnibuses exclusively to or from a railway station on their line and in connection with their trains, and not to hold themselves out as carrying on a general omnibus business, (2.) not to charge separate

RAILWAY—*continued.*

fares for intermediate journeys, and (3.) as far as practicable to confine their omnibus service to passengers to or from a station on their line, the Court discharged the injunction.

Order of Warrington J., [1906] 1 Ch. 811, varied. ATTORNEY-GENERAL *v.* MERSEY RAILWAY COMPANY – – – – **C. A. 81**

2. —— *Parliamentary Deposit—Special Act — Undertaking abandoned — Payment out of Deposit—No Abandonment Act—Parliamentary Deposits Act*, 1846 (9 *&* 10 *Vict. c.* 20), *s.* 3—*Parliamentary Deposits and Bonds Act*, 1892 (55 *&* 56 *Vict. c.* 27), *s.* 1, *sub-ss.* 1, 2, 3.

Where the usual deposit has been paid into Court under the Parliamentary Deposits Act, 1846, in furtherance of a special Act subsequently passed authorizing the construction of a railway, and the undertaking is afterwards abandoned, the deposit can be dealt with by the Court under s. 1 of the Parliamentary Deposits and Bonds Act, 1892, without a special abandonment Act being obtained. *In re* TORRINGTON AND OKEHAMPTON RAILWAY BILL – **Neville J. 186**

3. —— *Powers of Directors—Application of Company's Funds—Circulars to Shareholders—Influencing Votes—Payments for Proxy Papers and Stamps—Ultra Vires.*

A controversy had been going on for some years between the directors of a railway company and a body of shareholders with reference to questions of policy affecting the management of the company: previously to the half-yearly general meetings called for February and August, 1905, the directors sent to each shareholder a circular setting out the facts and the views of the directors and asking the support of the shareholders at the meeting; with this was enclosed a stamped proxy paper containing the names of three of the directors as proxies, with a stamped cover for return. The expenses of printing, posting, and stamping these documents was paid for out of the funds of the company. Officers and servants of the company had also been directed to call upon some of the shareholders with a view to obtaining their votes for the directors.

In an action by the shareholders to restrain the company and the directors from using the funds of the company in paying expenses thus incurred:—

Held (reversing the decision of Warrington J.), that it was the duty of the directors to inform the shareholders of the facts, of their policy, and the reasons why they considered that this policy should be maintained and supported by the shareholders, and that they were justified in trying to influence and secure votes for this purpose, and, accordingly, that expenses which had been bona fide incurred in the interest of the company were properly payable out of the funds of the company.

Studdert v. *Grosvenor*, (1886) 33 Ch. D. 528, overruled on this point.

Pickering v. *Stephenson*, (1872) L. R. 14 Eq. 322, explained. PEEL *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY – **C. A. 5**

RAILWAY—*continued.*

—— Minerals, Conveyance of land with—Adjoining railway the boundary—Highway—Parcels – – – – – **550**
See VENDOR AND PURCHASER. 2.

—— Way, Right of—User for domestic and business purposes—Substitution of railway station – – – – – **208**
See WAY, RIGHT OF.

RATES—Covenant by lessor to pay rates—Water rate – – – – – – **616**
See LANDLORD AND TENANT.

REAL ESTATE—"Residuary legatee"—Specific disposition of entirety at date of will
See WILL. 10. **465**

REAL PROPERTY LIMITATION—Mortgage of real estate subject to trust for conversion – – – – – – **686**
See MORTGAGE. 4.

—— Railway company—Possession of minerals Ultra vires – – – – **550**
See VENDOR AND PURCHASER. 2.

REAL PROPERTY LIMITATION ACT.
See under LIMITATIONS, STATUTE OF.

REALTY — Personalty or — Mortgage — Surplus proceeds of sale – – – – **313**
See MORTGAGE. 5.

RECEIVER—Company — Receiver and manager — Borrowing powers — Limit exceeded —Indemnity – – – – **528**
See COMPANY. 3.

RECTIFICATION—Conveyance – – **550, 564**
See VENDOR AND PURCHASER. 2, 6.

REGISTRATION — Contract of unregistered money-lender — Void transaction — Usury — Action to recover securities
See MONEY-LENDER. **300**

—— Copyright — Musical composition—Author and publisher—Assignment – **651**
See COPYRIGHT. 2.

REMAINDERMAN—Tenant for life and.
See under SETTLED ESTATE, and SETTLED LAND.

RENT — Payment of — Property in sub-soil — Mistake—Estoppel – – – **256**
See CONVEYANCE.

REPUDIATION—After decree for specific performance—Interest on purchase-money —Costs – – – – – **590**
See VENDOR AND PURCHASER. 5.

RESCISSION—Small contingent incumbrance—Refusal of purchaser to accept indemnity—"Without prejudice" – **244**
See VENDOR AND PURCHASER. 3.

"**RESIDENCE**"—Will — Construction—Bequest on conditions—Forfeiture – – **231**
See WILL. 5.

"**RESIDUARY LEGATEE**"—Real estate — Specific disposition of entirety at date of will – – – – – **465**
See WILL. 10.

RESIDUE — Aliquot shares — Class gifts—Forfeiture clause—Mode of division – **391**
See WILL. 4.

—— Estate duty—Exercise of general power of appointment by will—Appointed fund
See REVENUE. 2. **284**

—— Executors—No next of kin—Beneficial title to residue – – – – – **171**
See EXECUTORS.

RES JUDICATA—Mortgage—Order nisi for foreclosure on a principal charge and four supplementary charges — Omission of fifth supplementary charge – **428**
See MORTGAGE. 1.

RESOLUTION—Company—Special resolution—Retrospective and prospective effect
See COMPANY. 1. **289**

RESTRAINT OF TRADE—*Covenant in restraint of Trade—Construction—Master and Servant—Combination of Firms — Separate Businesses — Engagement by Agent on behalf of Combination—Reasonableness—Injunction.*

Decision of Neville J., [1907] 1 Ch. 189, reversed on the construction of the particular agreement in restraint of trade. HENRY LEETHAM & SONS, LIMITED *v.* JOHNSTONE-WHITE – – – – – – **C. A. 322**

—— Covenant in—Restricted area extending to the United Kingdom – – – **189**
See MASTER AND SERVANT.

RESTRAINT ON ANTICIPATION — Married woman — Rule against perpetuities — Severance of class – – – **276**
See HUSBAND AND WIFE.

RETAIN—Investments, Power to retain—Hazardous securities — Tenant for life and remainderman – – – – **22**
See WILL. 7.

RETROSPECTIVE AND PROSPECTIVE EFFECT —Company—Special resolution – **289**
See COMPANY. 1.

REVENUE — *Estate Duty — Apportionment — Real Estate—Marriage Settlement—Charging Sum on Death of Settlor—Will of Settlor—Specific Devise — Incidence of Duty — Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 1 ; *s.* 7, *sub-s.* 1 ; *s.* 9, *sub-s.* 1 ; *s.* 14, *sub-s.* 1.

On the death of an owner in fee who, by his marriage settlement, had charged his real estate with the payment after his death of a sum of money to be held on the trusts therein declared, and who, by his will, had subsequently devised the same real estate in strict settlement :—

Held, that s. 14, sub-s. 1, of the Finance Act, 1894, applied, and that his executor, having paid estate duty on the real estate, was entitled to recover from the trustees of the marriage settlement an amount equal to the proper rateable

REVENUE—*continued.*

part of the estate duty in respect of the sum so charged. *In re* HACKET. HACKET *v.* GARDINER **Joyce J. 385**

2. —— *Estate Duty—Incidence—Exercise of General Power of Appointment by Will—Appointed Fund—Residue—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 9, *sub-s.* 1.

Where a general power of appointment over a fund is exercised by will, the appointed fund does not pass to the executor "as such," and, consequently, the estate duty in respect thereof is payable out of the appointed fund in the absence of any direction in the will to the contrary.

In re Power, [1901] 2 Ch. 659, followed. *In re* J. DODSON. *In re* A. L. P. DODSON. GIBSON *v.* DODSON – – – **Warrington J. 284**

3. —— *Stamps — Foreclosure Order before* 1898—*Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *ss.* 54, 57—*Finance Act*, 1898 (61 & 62 *Vict. c.* 10), *s.* 6.

Sect. 54 of the Stamp Act, 1891, provides that "for the purposes of this Act the expression 'conveyance on sale' includes . . . . every decree or order of any Court . . . . whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser. . . . ."

Sect. 6 of the Finance Act, 1898, provides that "for the removal of doubts . . . . it is hereby declared that the definition of 'conveyance on sale' in the said s. 54 includes a decree or order for . . . . foreclosure" :—

Held, that the later section was declaratory, and therefore retrospective, so that an order of 1896 foreclosing a legal mortgage required stamping as a "conveyance on sale" within the earlier section.

Attorney-General v. *Theobald*, (1890) 24 Q. B. D. 557, followed.

Harding v. *Queensland Stamp Commissioners*, [1898] A. C. 769, 775, distinguished.

Semble, having regard to the reasoning in *Huntington* v. *Inland Revenue Commissioners*, [1896] 1 Q. B. 422, and *Heath* v. *Pugh*, (1881) 6 Q. B. D. 345, 360, the foreclosure order really fell within the earlier section even before it was construed by the later section. *In re* LOVELL AND COLLARD'S CONTRACT **Swinfen Eady J. 249**

—— Company — Meeting of shareholders — Voting—Proxy—Stamp – – **318**
See COMPANY. 5.

RIGHT OF WAY.
See under WAY, RIGHT OF.

ROYALTIES—Payments in nature of—Capital or income – – – – – **159**
See SETTLED ESTATE.

RULES OF SUPREME COURT :—**Order XVI. rr. 41, 47**—*Parties* – – – **719**
See ADMINISTRATION. 3.

—— **Order LV. r. 3, sub-ss.** *E*, *G* ; **r. 5**—*Chambers in the Chancery Division* – – **72**
See ADMINISTRATION. 1.

RULES OF SUPREME COURT—*continued.*
—— **Order LV. r. 42**—*Chambers in the Chancery Division* – – – – – **719**
See ADMINISTRATION. 3.

—— **Order LXV. rr. 14, 27, sub-r. 21**—*Costs* **428**
See MORTGAGE. 1.

—— **Order LXV. rr. 8, 27, sub-rr. 29, 38**—*Costs*
See PRACTICE. **607**

—— **Order LXV. r. 27, sub-r. 23**—*Costs* – **719**
See ADMINISTRATION. 3.

SALE—Contract by tenant for life to sell—Price to be fixed by arbitration—Breach of trust – – – – – **50**
See SETTLED LAND. 1.

—— Estate pur autre vie—Reversion in settlor—Power of tenant for life to sell fee
See SETTLED LAND. 4. **46**

—— Mortgage—Surplus proceeds of sale—Realty or personalty – – – – **313**
See MORTGAGE. 5.

—— Power of Sale.
See under POWER OF SALE.

—— Settled land.
See under SETTLED LAND.

—— Vendor and Purchaser.
See under VENDOR AND PURCHASER.

—— Vicarage—Purchase of new vicarage with proceeds—Loan—Lien – – **404**
See ECCLESIASTICAL LAW.

SCHOOLS—*Schools (Education)—Non-provided School — Religious Instruction — Time-table approved by Board of Education—Directions of Local Education Authority as to Secular Instruction—Non-compliance with by Managers—Withdrawal of Maintenance—Appeal by Managers—Decision of Board of Education—Jurisdiction of Court—Closing of School—Trespass—Inducing Teachers to break Contracts — Education Act*, 1902 (2 *Edw.* 7, *c.* 42), *s.* 7, *sub-s.* 3.

For many years prior to 1905 it had been the custom of the managers of the M. School, a non-provided school under the Education Act, 1902, to take the children from school to church on saints' days and holy days during the hours allowed for religious instruction. The time-table of the school, which had been approved by His Majesty's inspector, provided that religious observance and religious instruction should be given from 9 A.M., when the school opened, till 9.55; that at 9.55 the registers should be marked; and that secular education should commence at 10 A.M. and continue till noon. At the foot of the time-table was a note providing that on saints' days and holy days the registers should be marked at 9 A.M., the object being to enable the children to be taken to church at 11 A.M. In September, 1904, the local education authority under the Act of 1902 issued a direction that secular instruction in all schools within their district should commence not later than 9.45 A.M. and occupy the school hours for the rest of the day. The managers did not comply with this direction, and continued to take the children to church on saints' days and holy days, and took no steps to revise their time-table to bring it in accordance with the direction of the local education authority. On March 25, 1905, the local education authority ceased to maintain the school, and on March 27, 1905, sent their inspector to the school, who closed it, informing the children that they must attend other schools in the neighbourhood, and offering the teachers appointments in other schools, which they accepted. The managers appealed to the Board of Education, but the Board confirmed the action of the local education authority. In an action brought by the managers claiming (1.) a declaration that the local education authority were bound to continue to maintain the school, and (2.) damages for trespass and illegal acts in closing the school and inducing the teachers to leave the service of the managers without due justification:—

Held, that the direction of the local education authority was a direction as to secular instruction under s. 7, sub-s. 1 (*a*), of the Act of 1902, and that the question, being therefore one which arose under s. 7 of that Act, was one for the decision of the Board of Education under sub-s. 3 of that section, and that the jurisdiction of the Court was therefore excluded.

Held, also, that the managers, by virtue of their appointment under the Act of 1902, had not, in the absence of a special arrangement with the owner, such a possession of the school premises as would enable them to support an action of trespass; that no such arrangement had been proved; and that the claim for trespass therefore failed.

Held, further, on the facts, that the local education authority had not induced the teachers to break their contracts with the managers without justification. BLENCOWE *v.* NORTHAMPTONSHIRE COUNTY COUNCIL
Warrington J. 504

—— Will—Legacy to charitable institution—Trust deed—Lapse – – – **166**
See CHARITY. 1.

SCOTLAND — Evidence — Scottish document registered in Scotland—Production in England impossible — Secondary evidence of contents – – – **590**
See VENDOR AND PURCHASE. 5.

SECURITIES.
See under INVESTMENTS.

SERVANT — Master and.
See under MASTER AND SERVANT.

SET-OFF — Costs — Independent proceedings—Consolidation order – – – **428**
See MORTGAGE.

SETTLED ESTATE.
See also under SETTLED LAND.

SETTLED ESTATE—*continued.*

1. —— *Tenant for Life and Remainderman—Will — Real Estate — Trust for Conversion—Mining Lease—Payments in Nature of Royalties—Capital or Income.*

By his will a testator gave his residuary real and personal estate to a trustee upon trust for conversion, and to invest and pay the proceeds to his wife for life, and after her death to his children. There was no power given by the will to postpone conversion, nor any express gift of the income before conversion. Part of the testator's real estate consisted of land comprised in a mining lease which empowered the lessee to dig chalk on certain portions of the land demised, and to take additional chalk land, provided that he paid, by way of consideration for the purchase of the same, at the rate 900*l.* per acre. The estate was being administered by the Court, new trustees had been appointed, and a sale of the real estate directed, but no sale had yet taken place:—

Held, that the moneys received and to be received by the trustees of the will from the lessee in respect of the purchase of the additional chalk land must be treated by them as income and not capital.

In re Searle, [1900] 2 Ch. 829, followed. *In re* EARL OF DARNLEY. CLIFTON *v.* DARNLEY
Kekewich J. 159

—— Capital or income — Tenant for life and remainderman — Company—Return of capital – – – – – **289**
See COMPANY.

—— Investments — Unauthorized securities — Express power to retain—Enjoyment in specie – – – – – **394**
See WILL.

SETTLED LAND.
See also under SETTLED ESTATE.

1. —— *Contract by Tenant for Life to sell—Price to be fixed by Arbitration — Breach of Trust—Confirmation by Act of Parliament—Local and Personal Act—Statutory Effect—Rights of other Persons interested in the Estate.*

The tenant for life of settled land agreed to sell it in fee simple for a price to be fixed by arbitration. The agreement purported to be made by him under the Settled Land Acts as tenant for life. It provided that the award should be binding on all persons interested in the estates, and that the agreement itself should be conditional on the sanction of Parliament being given to the vendor and the purchasers to carry it into effect. A private Act of Parliament was accordingly obtained by which the agreement was "confirmed and made binding on the parties thereto respectively, and the same shall and may be carried into effect accordingly":—

Held, that statutory effect must be given to the terms of the agreement; the vendor must carry out the sale with all its consequences; and that all the parties interested in the settled land were bound although they were not mentioned in the Acts. *In re* THE EARL OF WILTON'S SETTLED ESTATES – – **Warrington J. 50**

SETTLED LAND—*continued.*

2. —— *Life Tenant—Limited Owner with Powers of Life Tenant—Heir-at-Law—Trustees in Possession—Powers of Management—Subsisting Accumulation Trust for discharge of Incumbrances—Void Trust for Purchase of Land—Accumulations Act*, 1892 (55 & 56 *Vict. c.* 58), *s.* 1—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 2; *s.* 58, *sub-s.* 1, *cls. vi., ix.*

A testatrix devised her freehold hereditaments to the use of her trustees, giving them large powers of management, and directing them to pay certain annuities and other periodic sums out of rents and profits. During the successive lives of the plaintiff and two other persons, but not for more than twenty years after the testatrix's death, the trustees were to apply the surplus rents in the discharge of incumbrances on the estates thereinbefore devised, or in the purchase of other estates to be held on like trusts.

Subject to and after the determination or failure of the several directions thereinbefore contained, the trustees were to stand possessed of the hereditaments in trust for F.'s daughters successively accordingly to seniority in tail male, with a like remainder to E.'s daughters. No such daughters were yet in esse.

After the determination or failure of the directions and trusts thereinbefore contained, the trustees were to settle the hereditaments to successive uses for lives and in tail male for ultimate remaindermen, but without any ultimate limitation of the fee. There were ultimate remaindermen for lives and in tail male in esse.

In *In re Baroness Llanover*, [1903] 2 Ch. 330, Farwell J. held that the direction to apply the surplus rents in the purchase of other estates must be deemed to be struck out by the Accumulations Act, 1892, and that the accumulation trust must be read as limited to the discharge of incumbrances.

On a subsequent motion to vary the minutes he formally declared that when and so soon as the accumulations should be sufficient to discharge the incumbrances the accumulation trust would become a trust for the purchase of land only and consequently void under the Accumulations Act, 1892, and that from that time, and so long as the surplus rents should by law remain undisposed of, they would belong, and be payable by the trustees as received, to the plaintiff as heiress-at-law. The accumulations were not yet sufficient to discharge the incumbrances.

Held, on the construction of the will, that, subject to the accumulation trust for discharge of incumbrances, the surplus rents would be payable to a daughter of F. or E. as tenant in tail male, but that until the birth of such a daughter, and subject to any such daughter's interest, the surplus rents subject to the accumulation trust were payable by the trustees to the plaintiff as heiress-at-law during the lives of F. and E., after whose deaths, subject to any daughter's estate in tail male, the ultimate remainders would come into possession.

Held, also, that, having regard to the nature and extent of her interest as heiress-at-law, the plaintiff had not at the present time the powers of a life tenant either under cl. vi. or

SETTLED LAND—*continued.*
cl. ix. of s. 58, sub-s. 1, of the Settled Land Act, 1882.

In re Jones, (1884) 26 Ch. D. 736, 742, followed as to cl. vi. and distinguished as to cl. ix.

In re Clitheroe Estate, (1885) 31 Ch. D. 135; *In re Richardson*, [1900] 2 Ch. 778; and *In re Money Kyrle's Settlement*, [1900] 2 Ch. 839, distinguished.

Semble, cl. vi. does not apply to a person merely entitled to receive surplus rents from trustees who are in possession and managing the estates, and cl. ix. does not apply (*a*) to a terminable life interest, or (*b*) to any interest taken under an intestacy, though comprised in the subject of the settlement under s. 2, sub-s. 2.

Held, also, that a mortgage by the trustees for the purpose of raising estate duty was an incumbrance within the accumulation trust. *In re* BARONESS LLANOVER. HERBERT *v.* RAM
Swinfen Eady J. 635

3. —— *Life Tenant—Limited Owners with Powers of Life Tenant—Non-beneficial Owners—Trustees with Estate pur autre vie—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 58, *sub-s.* 1, *cl. v.*

Sect. 58 of the Settled Land Act, 1882, which gives the powers of a life tenant to the nine classes of limited owners therein described, only applies to beneficial owners, and therefore trustees with an estate pur autre vie cannot exercise a life tenant's powers under sub-s. 1, cl. v.

Vine v. *Raleigh*, [1896] 1 Ch. 37, not followed. *In re* JEMMETT AND GUEST'S CONTRACT
Swinfen Eady J. 629

4. —— *Subject of Settlement—Conveyance to Trustees without Words of Limitation—Estate pur autre vie—Reversion in Settlor—Power of Tenant for Life to sell Fee—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 2; *s.* 20, *sub-s.* 1; *s.* 58, *sub-s.* 1 (*v.*), (*vi.*).

Where under a settlement the trustees take only an estate for their lives, and that of the survivor, the reversion in fee left in the settlor is comprised in "the subject of the settlement" by virtue of the Settled Land Act, 1882, s. 2, sub-s. 2, and a person having the powers of a tenant for life under that Act can sell and make a good title to the fee simple. *In re* HUNTER AND HEWLETT'S CONTRACT
Swinfen Eady J. 46

—— Incumbrances — Discharges — Expenses of paving street—Payment by tenant for life – – – – – – **67**
See STREET.

—— Investments, Power to retain—Hazardous securities — Trustees — Tenant for life and remainderman – – – **22**
See WILL. 7.

—— Periodical payments—Compromise for lump sum—Apportionment—Payment out of capital of estate – – – **30**
See SETTLEMENT.

SETTLEMENT—*Tenant for Life and Remainderman — Periodical Payments — Compromise for lump Sum—Apportionment—Payment out of Capital of Estate.*

The estate of a testator was liable for a periodical payment of an uncertain amount, and by a deed of compromise this payment was commuted for a lump sum of 7000*l.* and the estate released from the liability.

The plaintiff, who was entitled to a settled share of the testator's estate for her life, with remainder to her children, provided 3500*l.* out of her own moneys to get rid of this liability on the estate:—

Held, that she was entitled to be repaid this sum out of the testator's estate; and the proper mode of apportioning the burden between herself, as tenant for life, and the remaindermen was for the trustees of the will to raise it out of her settled share of the estate.

The rule laid down in *In re Bacon*, (1893) 62 L. J. (Ch.) 445, followed, in preference to that adopted in *In re Dawson*, [1906] 2 Ch. 211. *In re* HENRY. GORDON *v.* GORDON
Kekewich J. 30

—— Estate duty—Incidence of duty – **385**
See REVENUE. 1.

—— Settled land.
See under SETTLED LAND.

SHAREHOLDERS AND SHARES—Company.
See under COMPANY.

SOLICITOR—*Costs—Taxation—Will—Trustee—Power to charge for professional Services—"Professional and other Charges for his Time and Trouble"—Non-professional Services—Practice.*

To entitle a solicitor trustee, acting as solicitor to the trust estate under a direction to that effect in a will, to charge against the estate for work done by him, which, although not professional work, he could have charged for without any special bargain against a client who was not a trustee, there must be express words in the will shewing that such was the testator's intention.

A testator appointed executors and trustees, and directed that one of them should be the solicitor to his trust property and should be allowed "all professional and other charges for his time and trouble," notwithstanding his being an executor and trustee:—

Held, that this clause did not authorize the solicitor trustee to charge for work which was not professional work, although it was such work as he might have charged for against a client who was not a trustee. *In re* CHALINDER & HERINGTON
Warrington J. 58

—— Fraudulent statement — Trustee—Breach of trust—Duty to investigate assignee's title—Constructive notice—Relief **356**
See TRUSTEE. 1.

SPECIFIC PERFORMANCE—Repudiation after decree for — Interest on purchase-money—Costs – – – – **590**
See VENDOR AND PURCHASER. 5.

STATUTE—Contract by tenant for life to sell—Price to be fixed by arbitration—Breach of trust—Confirmation by Act of Parliament – – – – **50**
See SETTLED LAND. 1.

STATUTES.

1776.

17 Geo. 3, c. 53, ss. 1, 4, 10—*Clergy Residences Repair* – – – – – **404**
See ECCLESIASTICAL LAW.

1800.

39 & 40 Geo. 3, c. 98, s. 1—*Thellusson Act* – **567**
See ACCUMULATIONS.

1833.

3 & 4 Will. 4, c. 27, s. 34—*Real Property Limitation* – – – – – **686**
See MORTGAGE. 4.

1837.

1 Vict. c. 26, ss. 9, 10, 27—*Wills* – – **664**
See CONFLICT OF LAWS.
—— —— s. 24 – – – – – **665**
See WILL. 1.
—— —— s. 27 – – – – – **445**
See WILL. 2.

1838.

1 & 2 Vict. c. 23, s. 1—*Parsonages* – – **404**
See ECCLESIASTICAL LAW.

1842.

5 & 6 Vict. c. 45, ss. 2, 13, 14—*Copyright* – **651**
See COPYRIGHT. 2.
—— —— s. 3 – – – – – **107**
See COPYRIGHT. 1.

1845.

8 & 9 Vict. c. 18, ss. 95, 96, 97—*Lands Clauses*
See LANDS CLAUSES ACTS. **38**
8 & 9 Vict. c. 20, ss. 6, 16, 77—79—*Railways Clauses* – – – – – **550**
See VENDOR AND PURCHASER. 2.

1846.

9 & 10 Vict. c. 20, s. 3—*Parliamentary Deposits*
See RAILWAY. 2. **186**

1869.

32 & 33 Vict. c. 73, s. 5—*Telegraph* – – **621**
See TELEGRAPH.

1870.

33 & 34 Vict. c. 35, s. 7—*Apportionment* – **399**
See APPORTIONMENT.

1874.

37 & 38 Vict. c. 57, s. 1—*Real Property Limitation* – – – – – – **550**
See VENDOR AND PURCHASER. 2.
—— —— s. 8 – – – – – – **330**
See ADMINISTRATION. 4.
—— —— s. 8 – – – – – – **686**
See MORTGAGE. 4.

STATUTES—*continued.*

1875.

38 & 39 Vict. c. 55, s. 257—*Public Health* **67**
See STREET.

1878

41 & 42 Vict. c. 33, ss. 13, 14, 15—*Dentists* **420**
See PARTNERSHIP.

1880.

43 Vict. c. 19, ss. 3, 4, 5—*Companies* – **289**
See COMPANY.

1882.

45 & 46 Vict. c. 38, s. 2, sub-s. 2; s. 58, sub-s. 1, (vi.), (ix.)—*Settled Land* – – **635**
See SETTLED LAND. 2.
—— —— s. 2, sub-s. 2; s. 20, sub-s. 1; s. 58, sub-s. 1, (v.), (vi.) – – – **46**
See SETTLED LAND. 4.
—— —— s. 58, sub-s. 1, (v.) – – – **629**
See SETTLED LAND. 3.
45 & 46 Vict. c. 75, s. 5—*Married Women's Property* – – – – – **475**
See WILL. 9.

1890.

53 & 54 Vict. c. 5, s. 101—*Lunacy* – – **1**
See LUNACY.
53 & 54 Vict. c. 62, s. 1, sub-s. 5, (*a*), (*d*)—*Companies—Memorandum of Association* – – – – – – **269**
See COMPANY. 2.
53 & 54 Vict. c. 69, s. 11—*Settled Land* – **67**
See STREET.

1891.

54 & 55 Vict. c. 39, ss. 54, 57—*Stamps* – **249**
See REVENUE. 3.
—— —— s. 80 – – – – – **318**
See COMPANY. 5.

1892.

55 & 56 Vict. c. 27, s. 1, sub-ss. 1, 2, 3—*Parliamentary Deposits and Bonds* – **186**
See RAILWAY. 2.
55 & 56 Vict. c. 58, s. 1—*Accumulations* – **635**
See SETTLED LAND. 2.

1894.

57 & 58 Vict. c. 30, s. 1; s. 7, sub-s. 9; s. 9, sub-s. 1; s. 14, sub-s. 1—*Finance* **385**
See REVENUE. 1.
—— —— s. 9, sub-s. 1 – – – – **284**
See REVENUE. 2.
57 & 58 Vict. c. ccxiii. s. 5, sub-ss. 29, 32; ss. 90, 173—*London Building* – **295**
See LONDON.

1896.

59 & 60 Vict. c. 35, s. 3, sub-s. 1—*Judicial Trustees* – – – – – **356**
See TRUSTEE. 1.

1898.

61 & 62 Vict. c. 10, s. 6—*Finance* – – **249**
See REVENUE. 3.

STATUTES—*continued.*

1900.

63 & 64 Vict. c. 51, s. 2—*Money-lenders* - 300
See MONEY-LENDER.

1902.

2 Edw. 7, c. 41, s. 2; Fourth Schedule—*Metropolis Water* - - - - 665
See WILL. 1.

2 Edw. 7, c. 42, s. 7, sub-s. 3—*Education* - 504
See SCHOOLS.

1904.

4 Edw. 7, c. 23, s. 2—*Licensing Act* - - 64
See BREWERY COMPANY.

STAMPS—Foreclosure order before 1898 - 249
See REVENUE. 3.

STREET—*Paving Street, Expenses of—Charge on Premises—Payment by Tenant for Life—Private Street Works Act*, 1892 (55 & 56 *Vict. c.* 57), *ss.* 13, 17—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 257—*Settled Land—Incumbrance—Discharge—Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 11.

A person entitled to the interest of a tenant for life in certain property paid the expenses incurred by a local authority in paving a private street, and charged upon the property under s. 13 of the Private Street Works Act, 1892 :—

Held, that he was entitled to a charge for the capital moneys so paid under s. 13, which gives an absolute charge on the fee simple, notwithstanding the fact that s. 17 of the same Act gives limited owners a power to raise moneys so paid by mortgage on the terms that the capital shall be repaid by instalments within twenty years.
In re PIZZI. SCRIVENER *v.* ALDRIDGE
Neville J. 67

SUB-SOIL—Property in—Payment of rent—Mistake—Estoppel - - - 256
See CONVEYANCE.

TAXATION—Costs—Solicitor—Trustee - 58
See SOLICITOR.

TELEGRAPH—*Telephone—Postmaster-General—Monopoly—Exceptions—Private Lines—Telegraph Act*, 1869 (32 & 33 *Vict. c.* 73), *s.* 5.

Private telegraph or telephone lines of the A to A class, such as lines from a merchant's office to his private house, or from a head to a branch office, fall within s. 5 of the Telegraph Act, 1869, and are therefore excepted from the Postmaster-General's monopoly, but private lines of the A to B class, viz., lines connecting two or more separate and independent persons or businesses, are not within the exception.

Attorney-General v. *Edison Telephone Co. of London, Ld.*, (1880) 6 Q. B. D. 244, 260—262, applied. POSTMASTER-GENERAL *v.* NATIONAL TELEPHONE COMPANY, LIMITED
Swinfen Eady J. 621

TELEPHONE—Postmaster-General—Monopoly—Exceptions—Private lines - 621
See TELEGRAPH.

TENANT—Landlord and.
See under LANDLORD AND TENANT.

TENANT FOR LIFE—And remainderman.
See under SETTLED ESTATE, and SETTLED LAND.

THELLUSSON ACT—Person born after the testator's death - - - - 567
See ACCUMULATIONS.

TIME—Next of kin according to the Statute of Distribution—Time for ascertaining class - - - - - 450
See WILL. 3.

TITLE—Vendor and purchaser.
See under VENDOR AND PURCHASER.

TRADE—Covenant in restraint of—Restricted area extending to the United Kingdom
See MASTER AND SERVANT. 189

—— Restraint of trade.
See under RESTRAINT OF TRADE.

TRADE NAME—*Professional Designation—"Incorporated Accountant"—Descriptive or Fancy Name—Use of Name appropriated to particular Society—Unauthorized Use by another Society and by Individuals—Legal Injury—Injunction.*

The plaintiff society was incorporated in 1885 under the Companies Act, 1867, as a company not for gain, without the use of the word "limited," under licence of the Board of Trade. In 1886 the plaintiff society recommended its members to adopt as their professional designation the use after their names of the term "incorporated accountant." By 1905 that designation had come to mean to that section of the public who had dealings with accountants a member of the society, which, by its system of tests and examinations, had conferred upon its members the valuable privilege of a recognized status for ability and integrity. In that year the defendant association was incorporated under the Companies Acts as a company limited by guarantee. Shortly after its incorporation its council recommended its members to adopt the designation "incorporated accountant" with the addition of the abbreviation "Lon. Asson."

In an action by the plaintiff society against the defendant association and G., one of its members, claiming (1.) an injunction to restrain G. from using in connection with his business of accountant the designation "incorporated accountant," and (2.) an injunction to restrain the defendant society from holding out by advertisement or otherwise that its members were entitled to use such designation :—

Held, that the designation "incorporated accountant" was a fancy and not a descriptive term, and had come to denote membership of the society, and, therefore, that the unauthorized use of it inflicted an injury on the plaintiff society, in respect of which it was entitled to maintain an action.

Held, also, that the plaintiff society had a pecuniary interest in preventing the defendant association from attempting, by representations and inducements held out to members of the

TRADE NAME—*continued.*
profession, to reduce the status of the plaintiff society by conferring improperly an indication of that status.

Held, therefore, that the plaintiff society was entitled to the injunctions which it claimed.

Society of Accountants in Edinburgh v. *Corporation of Accountants, Ld.*, (1893) 20 R. 750, followed. SOCIETY OF ACCOUNTANTS AND AUDITORS *v.* GOODWAY AND LONDON ASSOCIATION OF ACCOUNTANTS, LIMITED
Warrington J. 489

TRANSFER—Shares—Infant nominee—Winding-up—Contributories – – **582**
See COMPANY. 4.

TRAVERSE—Inquisition—Right of lunatic to traverse—Discretion of judge in lunacy
See LUNACY. **1**

TRESPASS—Jurisdiction of Court—Closing of school – – – – – **504**
See SCHOOLS.

TRUST—Will—Legacy to charitable institution—School—Trust deed—No lapse – **166**
See CHARITY. 1.

—— Will—Real estate—Trust for conversion—Mining lease—Payments in nature of royalties—Capital or income – **159**
See SETTLED ESTATE.

TRUSTEE—*Breach of Trust—Charge on Share of Beneficiary—No Notice to Trustees—Assignment of Share subject to Charge—Solicitor—Fraudulent Statement—Payment to Assignee of Equity of Redemption—Duty to Investigate Assignee's Title—Constructive Notice—Liability—Relief—Judicial Trustees Act*, 1896 (59 & 60 *Vict. c.* 35), *s.* 3, *sub-s.* 1.

The defendants, who were trustees, upon the distribution of their trust fund paid the share of a beneficiary to their solicitor in reliance upon his statement that he was the assignee of the share and without calling upon him to prove his title. The share had been assigned to him by deed which recited the creation of a prior charge on the share and assigned the share expressly subject to the charge. The solicitor had acted for the plaintiff upon the transfer to her of this charge, but no notice of the charge or transfer had ever been given to the trustees. In an action for an account and payment of what was due under the charge:—

Held, that the defendants were liable, on the ground that the assignment of the share necessarily set them upon inquiry as to the title of the alleged assignee, and that if they had done their duty and properly investigated his title they would have been affected with notice of the plaintiff's charge, and that, having failed in their duty, they could not shelter themselves behind the fraud of their solicitor.

Jones v. *Smith*, (1841) 1 Hare, 43; (1843) 1 Ph. 244, applied.

Held, further, that the defendants were not entitled to relief under s. 3, sub-s. 1, of the Judicial Trustees Act, 1896, the section not having been intended to apply to a case of this kind. DAVIS *v.* HUTCHINGS – – **Kekewich J. 356**

2. —— *Practice—Assignment of Share in Reversionary Fund—Distribution—Payment to Assignee—Right to Delivery of Assignment.*

On the distribution of a trust fund a share in which has been previously assigned the trustee has no right to require the delivery to him of the assignment and other documents of title before payment of the share to the assignee. *In re* PALMER. LANCASHIRE AND YORKSHIRE REVERSIONARY INTEREST COMPANY *v.* BURKE
Swinfen Eady J. 486

—— Debenture trustees, Power of—Licence, Non-renewal of—Compensation—Capital moneys—Investment – **64**
See BREWERY COMPANY.

—— Estate pur autre vie, Trustees with—Limited owners with powers of life tenant—Non-beneficial owners – **629**
See SETTLED LAND. 3.

—— Investments, Power to retain—Hazardous securities—Tenant for life and remainderman – – – – – **22**
See WILL. 7.

—— Life tenant—Trustees in possession—Powers of management – – – **635**
See SETTLED LAND. 2.

—— Mortgage—Payment into Court by trustees under Trustee Act, 1893—Payment out—Application by mortgagors—Terms imposed by Court – – – **686**
See MORTGAGE. 4.

—— Power of sale—Power given to "my trustees"—Power exercisable by survivor
See WILL. 9. **475**

—— Sale by trustees of will—Conflict between two sets of trustees—Outstanding legal estate—Deduction of title – – **695**
See VENDOR AND PURCHASER. 4.

—— Sale, No power of—Vendor selling as trustee—Written request of beneficiaries before contract – – – – **238**
See VENDOR AND PURCHASER. 1.

—— Solicitor—Costs—Will—Power to charge for professional services—Non-professional services – – – – **58**
See SOLICITOR.

ULTRA VIRES—Parcels—Minerals, Conveyance of land with—Adjoining railway the boundary—Highway – – – **550**
See VENDOR AND PURCHASER. 2.

—— Power of directors—Influencing votes—Payments for proxy papers and stamps
See RAILWAY. 3. **5**

—— Railway company—Omnibus service—Incidental powers – – – **81**
See RAILWAY. 1.

UNDERGROUND ROAD—Carriage of foreign minerals—Property in subsoil—Payment of rent—Mistake—Estoppel **256**
See CONVEYANCE.

"UNMARRIED"—Will — Construction — Bequest on conditions—Forfeiture – **231**
See WILL. 5.

USER—Footway—User of sub-tenants inconsistent with dedication – – **704**
See HIGHWAY.

—— Way, Right of—User for domestic and business purposes—Substitution of railway station – – – – **208**
See WAY, RIGHT OF.

USURY—Money-lenders.
See under MONEY-LENDER.

VENDOR AND PURCHASER—*Contract—Title—Vendor selling as Trustee—Legal Estate in Vendor—No Power of Sale—Written Request of Beneficiaries before Contract.*

A contract for sale of a freehold house—lot 1—provided that "the vendor of lots 1 and 2 who is the trustee under the will of the said James Baker deceased is selling the said properties under the trusts and powers vested in him thereunder and shall not be required to enter into any covenant other than that implied by his conveying in such capacity as aforesaid."

It also provided that "The tenant for life of lot 1 will join in the conveyance to the purchaser for the purpose of releasing her life interest therein."

On the examination of title it appeared that the vendor had the entire legal estate as trustee of the will, but had no power or trust for sale thereunder. He had, however, entered into the contract at the written request of the life tenant and all the other beneficiaries, including himself, so that he could compel them to join :—

Held, that the vendor had shewn a good title in accordance with the contract.

In re Bryant and Barningham's Contract, (1890) 44 Ch. D. 218, and *In re Head's Trustees and Macdonald*, (1890) 45 Ch. D. 310, distinguished. *In re* BAKER AND SELMON'S CONTRACT – – – – **Swinfen Eady J. 238**

2. —— *Parcels — Minerals — Conveyance of Land with Minerals—Adjoining Railway the Boundary — Highway — Presumption as to Minerals underlying Railway—Written Option to Purchase—Subsequent Conveyance—Rectification of Conveyance and Option—Admissibility of Evidence — Possession of Minerals — Wrongful Working under Colour of Title—Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 1—*Purchase by Railway Company after Expiration of Special Act — General Statutory Powers—Ultra Vires—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 6, 16, 77–79.

The presumption that, where a highway is a boundary, the subsoil of the highway ad medium filum viæ passes to the grantee of the land adjoining the highway, does not apply to a railway that is a boundary. Under a grant, therefore, of the land and minerals lying on each side of and adjoining a railway, the minerals underlying the railway, which have not been acquired by the railway company, will not pass to the grantee.

In 1875 A. by a written agreement gave B. a six months' option to purchase land and minerals on each side of and adjoining a railway. The option was duly exercised, and the land and minerals as described in the option agreement were conveyed to B. In 1884 B. had become the owner of collieries adjoining the land so acquired from A., and from that time worked parts of the minerals underlying the railway in the honest belief that he had a title thereto. In 1906 A. brought an action against B. claiming the minerals under the railway. B. counterclaimed for rectification of the conveyance and option agreement so as to include these minerals, alleging mutual mistake, and tendered evidence to shew that the parties at the date when the option was exercised intended to include these minerals in the purchase :—

Held, on the authority of *May* v. *Platt*, [1900] 1 Ch. 616, and *Davies* v. *Fitton*, (1842) 2 D. & War. 225, that the evidence was not admissible. *Quære*, as to the principle of those decisions.

Held, also (following *Ashton* v. *Stock*, (1877) 6 Ch. D. 719), that B. had not by possession or otherwise acquired a title to the minerals underlying the railway, and that the Statute of Limitations afforded him no defence to the action.

A railway company at any time after the due completion of the railway authorized by their special Act can, under their general statutory powers, purchase any land within the limits of deviation of their deposited plans which are necessary for or incidental to the business they are carrying on, e.g., the maintenance of the line.

In 1863 a railway company under the powers of a special Act, which incorporated the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, acquired land, without the underlying minerals, and constructed their railway across it, within the four years for that purpose limited by the special Act. In 1904 the company, to prevent injury to the railway by subsidence, entered into an informal agreement to purchase the minerals from A., the owner, and subsequently by a contract under seal assigned the benefit of the agreement to B., who, claiming the minerals adversely to A., disputed its validity :—

Held, that the company, by assigning the agreement to B., had ratified it ; and that it was not in other respects ultra vires the company, notwithstanding that their powers under their special Act had expired. THOMPSON *v.* HICKMAN – – – – – **Neville J. 550**

3. —— *Rescission — Reasonable Ground — Small Contingent Incumbrance — Refusal of Purchaser to accept Indemnity—Notice of Rescission—"Without Prejudice."*

A purchaser is not bound to accept an indemnity for a contingent incumbrance, however

VENDOR AND PURCHASER—*continued.*
small the amount or remote the contingency, but is entitled to have it discharged.

Refusal to accept an indemnity is not in itself a "reasonable ground" for rescission under the usual condition.

A notice of rescission signed "without prejudice" is void. *In re* WESTON AND THOMAS'S CONTRACT – – – **Swinfen Eady J. 244**

4. —— *Settlement—Real Estate—Equitable Limitations—Power of Appointment—Trustees directed to Pay and Transfer the Property to Appointees—Power of Sale—Appointment by Will upon Trust for Sale—Sale by Trustees of Will—Conflict between Two Sets of Trustees—Outstanding Legal Estate—Deduction of Title.*

By a marriage settlement real estate was conveyed to trustees upon trust after the death of the survivor of the husband and wife "to pay and transfer the said hereditaments and premises" to the children of the marriage as the survivor of the husband and wife should appoint. The settlement contained powers for the trustees to sell the property during the lives of the husband and wife and the survivor and during the lifetime of any child. The husband survived his wife, and by his will appointed the property to trustees on trust for sale and conversion, and directed them to stand possessed of the proceeds upon a series of complicated trusts for the benefit of his children. The trustees of the will, purporting to act under the trust for sale therein contained, contracted to sell the property. The purchaser took the objection that the proper persons to sell were the representatives of the last surviving trustee of the settlement:—

Held that, inasmuch as the trustees of the settlement were directed to "pay and transfer" the property to the appointees, the trust for sale by the trustees of the will was expressly authorized by the terms of the power and overrode the powers of sale contained in the settlement; the trustees of the will were therefore the proper persons to sell the property and could call for a conveyance of the legal estate.

The 14th condition of sale provided that every deed or instrument which should be necessary for getting in any outstanding estate or interest or for completing the vendor's title should be prepared by and at the expense of the purchaser, who should also bear the expense of the doing of every act needed for perfecting the assurance by all parties other than the vendors:—

Held, that this condition did not relieve the vendors from the expense of deducing the title to the outstanding legal estate. *In re* ADAMS' TRUSTEES' AND FROST'S CONTRACT **Warrington J. 695**

5. —— *Specific Performance—Defect in Title—Repudiation after Decree for Specific Performance—Evidence—Scottish Document registered in Scotland—Production in England impossible—Secondary Evidence of Contents—Interest on Purchase-money—Costs.*

A purchaser's right to repudiate the contract is an equitable right arising from want of mutuality, and may be a defence to an action for specific performance; but in order to avail himself of that defence he must repudiate the contract as soon as he finds that the vendor cannot make a good title.

After a decree for specific performance has been made the purchaser cannot repudiate the contract without the leave of the Court.

A vendor is not bound to produce or procure a covenant for the production of a document which is of record in Scotland, but must furnish sufficient secondary evidence of its contents.

Where an order is made for specific performance, interest on purchase-money is payable from the time when the Master certifies that a good title is first shewn, not from the time when such a title is first shewn as would enable the purchaser safely to take possession. HALKETT *v.* EARL OF DUDLEY – – – – **Parker J. 590**

6. —— *Written Contract—Conveyance—Error in Parcels—Common Mistake—Rectification of Conveyance—Laches.*

In 1900 A. sold and conveyed land to B. In 1906 A. brought an action against B. for rectification of the conveyance, alleging that by common mistake the parcels in the conveyance included more land than was comprised in the written contract in pursuance of which the conveyance was executed. A. commenced the action as soon as he became aware of the error. B. denied any mistake, and further contended that A. came too late for rectification:—

Held, on the evidence, that there had been a common mistake, and that A. was entitled to rectification, for that he had not been guilty of any laches.

Bloomer v. *Spittle* (1872), L. R. 13 Eq. 427, questioned. BEALE *v.* KYTE – **Neville J. 564**

—— Settled land.
See under SETTLED LAND.

VESTING—Legacy—Intermediate Income **470**
See WILL. 8.

—— Will—Vesting gift to son at thirty-five—Discretionary trust for maintenance out of income – – – – – **180**
See WILL. 11.

VICARAGE—Sale—Purchase of new vicarage with proceeds—Loan—Lien – **404**
See ECCLESIASTICAL LAW.

VOTING—Company—Meeting of shareholders—Proxy—Stamp—Authority to fill up blanks – – – – – **318**
See COMPANY. 5.

WALL—Party wall—Statutory notice by building owner—"Adjoining premises"—Various interests in adjoining premises
See LONDON. **295**

WATER—Will—Bequest—Ademption—"Money invested in" Lambeth Waterworks Company—Transfer of undertaking to Water Board – – – – – **665**
See WILL. 1.

WATER RATE—Covenant by lessor to pay rates
See LANDLORD AND TENANT – **616**

WAY, RIGHT OF—*Easement—Messuages in City of London—Warehouses—Dwelling-houses—Passage—Way of Convenience—Common Owner—Severance by Devise—Implied Grant—Extent of Right—User for Domestic and Business Purposes—Change in Character of one Dominant Tenement—Substitution of Railway Station—Original Easement—Impossibility of Exercise—Suspension—Rights of Owners of Easement inter se—Injunction.*

A testator, who died in 1832, devised several freehold houses in the City of London "with their appurtenances" to various devisees. They were adjoining houses, and had been built by the testator, each of them being partly a dwelling-house and partly a warehouse. They all communicated with a passage, a cul-de-sac, which ran along the backs of the premises into a side street, and had been constructed by the testator for the convenience of the several houses, and had always been used in connection with them. The testator did not devise the passage or make an express grant of any rights of way over it to his devisees. The plaintiffs, who own the two houses abutting on to the passage at its open end, and the defendants' predecessors in title, who owned the adjoining house higher up the passage, had for many years used the passage for loading and unloading vans for the purposes of their respective businesses. The plaintiffs now sought to restrain the defendants, who had acquired, and built a railway station upon, the site of the last mentioned house, from obstructing the passage by using and inviting their passengers to use it as a thoroughfare to or from their station :—

Held—(1.) That a grant to the several devisees of a right of way contemplating such user as would be required for business as well as domestic purposes must be implied from the surrounding circumstances.

Pearson v. *Spencer*, (1803) 3 B. & S. 761, and *Phillips* v. *Low*, [1892] 1 Ch. 47, applied.

(2.) That a railway station was not and could not have been the contemplation of the testator, and was, both in construction and mode of occupation, something entirely different from any dwelling-house, warehouse, or even manufactory, that could have been erected on the land ; and

(3.) That the defendants having made it impossible that the passage should be used by them for the purposes for which it was designed, and for which it had in fact been used, their right was not under the present circumstances, exercisable at all.

The principle enunciated by James L.J. in *Wimbledon and Putney Common Conservators* v. *Dixon*, (1875) 1 Ch. D. 362, 368, applied as between the several grantees of a right of way.

Semble, that a right of way thus suspended is capable of being revived.

The construction of an implied grant of a right of way by evidence of user, exemplified. MILNER'S SAFE COMPANY, LIMITED *v.* GREAT NORTHERN AND CITY RAILWAY COMPANY **Kekewich J. 208**

WIFE.

See under HUSBAND AND WIFE.

WILL—*Bequest—Will speaking from Death—Ademption—"Money invested in" Lambeth Waterworks Company—Transfer of Undertaking to Water Board—Compensation—Metropolitan Water Stock—Metropolitan Water Act*, 1902 (2 *Edw.* 7, *c.* 41), s. 2 ; *Fourth Schedule—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 24—*Will—Construction.*

A testator bequeathed "the interest arising from money invested in (inter alia) the Lambeth Waterworks Company" to a legatee for life and then over. Between the dates of his will and death the undertaking of the Lambeth Waterworks Company was acquired by the Metropolitan Water Board under the provisions of the Metropolis Water Act, 1902, and a sum of Metropolitan Water Board stock had been issued to the testator as compensation in respect of the ordinary stock which at the date of his will he held in the Lambeth Waterworks Company :—

Held, that the Metropolitan Water Board stock did not pass under the bequest.

Decision of Joyce J., [1906] 2 Ch. 480, affirmed. *In re* SLATER. SLATER *v.* SLATER **C. A. 665**

2. —— "*Bequest of Personal Property described in a general Manner*"—*Exercise of general Power of Appointment—Gift of Stocks, Shares and Securities—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 27.

A married woman, having general powers of appointment under her marriage settlement and her father's will (subject to a life interest in her husband) over personal property which at the time of her death consisted of railway and colonial stocks, made a will by which subject to her husband's life interest she bequeathed to her three sisters "all stocks, shares and securities which I possess or to which I am entitled." The husband survived the testatrix :—

Held, that there was a "bequest of personal property described in a general manner" within the meaning of s. 27 of the Wills Act, 1837, which operated as an appointment of the stocks under the powers.

Turner v. *Turner*, (1852) 21 L. J. (Ch.) 843, followed. *In re* JACOB. MORTIMER *v.* MORTIMER – – – – – **Parker J. 445**

3. —— *Class—Next of Kin according to the Statute of Distribution—Time for ascertaining Class.*

A testator directed that the trustees of his will should stand possessed of a fund, and the investments and income thereof, upon trust to pay the income to his nephew S. during his life, and after his death in trust in equal shares for the children of S. who being sons should attain twenty-one, or being daughters should attain that age or marry, and for the issue (living at that time who being males should attain twenty-one, or being daughters should attain that age or marry) of any child of S. who died in his lifetime leaving issue living at his death, so that such issue should take equally the shares which their parent would have taken. And the testator, after empowering his trustees, in addition to the powers of maintenance, education, and accumulation of surplus income given to trustees by statute, at any time

WILL—*continued.*

after the death of S., or during his life with his written consent, to raise not exceeding half of the expectant or vested share of any child or other his issue and to apply the same for his advancement or benefit, declared as follows: "If no child or other issue of my said nephew S. lives to attain a vested interest under the trusts hereinbefore contained, then, subject to the trusts hereinbefore declared or referred to in favour of my said nephew S. and his issue, I direct that the trust fund and the income thereof and all statutory accumulations of income (if any) or so much thereof respectively as shall not have been applied under any of the powers hereinbefore contained or referred to shall be in trust for such person or persons as on the death of my said nephew S. will be entitled to [*sic*] as my next of kin under the Statute for the Distribution of Intestates' Estates."

The testator died in 1884, and his nephew S. was then his sole next of kin. S. died in 1906, having made a will and appointed executors:—

Held, that, notwithstanding the death of S. was not necessarily the period of distribution, the class to take were the next of kin of the testator at the time of his death, and not the class who would have been his next of kin, according to the Statutes of Distribution, had he died when S. died, and that the executors of S. were entitled to the fund.

Sturge and Great Western Railway Company, (1881) 19 Ch. D. 444, distinguished. *In re* WILSON. WILSON *v.* BATCHELOR

Parker J. 450

4. —— *Class — Residue — Aliquot Shares — Class Gifts — Forfeiture Clause — Forfeited Interest to lapse and form Part of Residue—Mode of Division.*

A testator directed his trustees to stand possessed of the proceeds of sale and conversion of his residuary real and personal estate, "As to three equal seventh parts thereof" in trust for a class of persons living at his death (hereinafter called class A) as tenants in common; and "As to the remaining four equal seventh parts thereof" in trust for another class of persons living at his death (hereinafter called class B) as tenants in common. He provided that if a certain event should happen in his lifetime the share of a certain member of class A "shall lapse and form part of my residuary personal estate." The event happened and the share lapsed:—

Held, that three-sevenths of the lapsed share went to the effective members of class A and four-sevenths to class B. *In re* WAND. ESCRITT *v.* WAND - - - **Swinfen Eady J. 391**

5. —— *Conditions, Bequest on—Forfeiture—"Residence"—"Unmarried"—Will — Construction.*

By his will a testator gave his leasehold house, No. 33, Turner Road, Lee, to his trustees, upon trust to permit his niece C. to hold and occupy the same free of rent, but subject to a proviso thereinafter mentioned, "and to her residing upon the said premises during her lifetime." In a subsequent part of the will the testator directed

WILL—*continued.*

that the use and occupation of the house aforesaid were given by him upon the express condition that after his decease C. should "remain single and unmarried," and in the event of her marrying she was to forfeit the bequest, and it was to fall into the residue.

C. resided in the house until her marriage and for some ten years afterwards, and then her husband took another house in the neighbourhood, and she moved into it with him. She let all the rooms but one at No. 33, Turner Road, to a weekly tenant, and in this reserved room she kept a bed always ready for use, her books, some clothes, writing materials, &c., and she retained the key of this room and also one of the outside doors of the house. She went there two or three times a week, and occasionally had meals and slept there:—

Held, that "residing" meant "personally residing," and that what C. had done at No. 33, Turner Road, did not amount to residing within the meaning of the will:—

But *held*, also, that, reading the subsequent void condition in restraint of marriage into the condition as to residence for the purpose of construing the will, the words "residing during her lifetime" must mean during her lifetime while she was capable of residing, namely, as a spinster; and, therefore, upon her marriage, the condition as to residence did not apply, and there was no forfeiture. *In re* WRIGHT. MOTT *v.* ISSOTT

Kekewich J. 231

6. —— *Investments—Life Tenant and Remainderman—Unauthorized Securities—Express Power to retain—Enjoyment in Specie.*

Where a will contains no trust for conversion, and the life tenant of residue (or of a legacy) is given the entire income thereof, he is entitled to the income of unauthorized permanent securities retained (and appropriated) by the trustees under a power of retainer (and appropriation).

In re Sheldon, (1888) 39 Ch. D. 50, and *In re Bates*, [1907] 1 Ch. 22, followed.

In re Chator, [1905] 1 Ch. 233, distinguished. *In re* WILSON. MOORE *v.* WILSON

Swinfen Eady J. 393

7. —— *Investments—Tenant for Life and Remainderman—Trustees—Power to retain Investments — Hazardous Securities — Rule in* Howe *v.* Earl of Dartmouth, 7 *Ves.* 137*a*—*Will —Construction.*

By his will a testator gave his personal estate to his wife for life and after her death to other persons, and appointed his wife and the plaintiff trustees of his will. By a codicil the testator empowered his trustees to carry on his businesses of a colliery owner and farmer, and gave them a general discretion "to retain any investments" belonging to him at his death without being responsible for any loss occasioned thereby. The testator was a director of a coal company, limited, which had wide powers of engaging in colliery and other businesses under its articles and memorandum of association, and possessed a considerable reserve fund. At the time of his death the testator was possessed of

WILL—*continued.*

336 fully paid up shares of 50*l.* each in the coal company, and in pursuance of their power under the codicil the trustees retained them :—

Held, that the shares were hazardous, but not wasting securities, and the power to retain investments was sufficient to exclude the operation of the rule in *Howe* v. *Earl of Dartmouth*, (1802) 7 Ves. 137a. The tenant for life was, therefore, entitled to the income of the shares so long as the trustees thought fit to retain them. *In re* BATES. HODGSON *v.* BATES
Kekewich J. 22

8. —— *Legacy—Direction to set apart and pay by Instalments on Legatee's attaining specified Ages—No Gift over—Postponement of Payment—Vesting—Intermediate Income.*

Testatrix desired and directed to set apart the sum of 200*l.* for her grandson, J. W. L. S., the sum of 150*l.* for her grandson J. V. S., and the sum of 150*l.* for her grandson F. D. S., the said sums to be free of duty and to be paid respectively as to 50*l.*, part thereof, on their attaining the age of twenty-one years, and as to 50*l.*, part thereof, on their attaining the age of twenty-five years, and she directed that the balance 100*l.* for her grandson J. W. L. S. be paid him on his attaining the age of thirty years, and the balances 50*l.* for J. V. S. and F. D. S. be paid them on their respectively attaining the age of thirty years. There was no disposition of the intermediate income, or gift over of the principal.

J. W. L. S. survived the testatrix, and on attaining twenty-one the first-mentioned sum of 50*l.* was paid to him, but he died before attaining twenty-five :—

Held, that each bequest was equivalent to a gift of a legacy to the particular legatee, payable as to part at twenty-one, further part at twenty-five, and the balance at thirty ; and that each legatee upon attaining twenty-one was entitled to the payment of his legacy and the intermediate interest or income, and that the legal personal representative of any legatee who survived the testatrix and died before actual payment was entitled to the legacy or balance unpaid of both principal and income.

Gosling v. *Gosling*, (1859) Joh. 265, applied. *In re* COUTURIER. COUTURIER *v.* SHEA
Joyce J. 470

9. —— *Power of Sale—Power given to "my Trustees"—Power exercisable by Survivor—Married Woman's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 5—*Reversionary Interest in Land—Woman married before the Act—Conversion into Money before coming into Possession—Accruer of Title—Will—Construction.*

In a will executed before any of the Acts giving statutory power to trustees, when a power of sale is given to trustees by name or under the description "my trustees," to whom the legal estate is devised, the power can be exercised by the surviving trustees or the sole surviving trustee. The contrary rule never applied except to a bare power.

If a woman married before the commencement of the Married Women's Property Act, 1882, has before the commencement of the Act

WILL—*continued.*

acquired a title in reversion to land, and the land is converted into money after the commencement of the Act but before the property falls into possession, the conversion gives no new title to the married woman, and the property is not made her separate estate by s. 5, sub-s. 1, of the Act. *In re* BACON. TOOVEY *v.* TURNER
Swinfen Eady J. 475

10. —— "*Residuary Legatee*"—*Real Estate—Specific Disposition of Entirety at Date of Will—Subsequent Acquisition of further Real Estate—Intestacy—Extrinsic Evidence—Will—Construction.*

Testatrix, by her will dated in 1891, after giving a pecuniary legacy "free of income tax," and specifically disposing of certain real estate "free of legacy duty," "bequeathed" a freehold cottage to E. J. H. She then directed that all her household furniture and other chattels should be sold, reserving the right to E. J. H. to retain any special articles she might wish for, "all else to be sold." Then, after disposing of her jewellery, she concluded, "I leave the aforesaid E. J. H. my residuary legatee." All the real estate which she possessed at the date of her will was thereby specifically disposed of. She died in 1903, having in the meantime purchased other real estate :—

Held, that in considering whether the naming of a "residuary legatee" constituted a residuary devise, the fact that at the date of the will the testatrix possessed no real estate other than that specifically and completely disposed of must be borne in mind ; but that there was not sufficient context in this will to modify the prima facie meaning of the term "residuary legatee" ; and, consequently, that the subsequently acquired real estate did not pass to E. J. H., but was undisposed of by the will. *In re* GIBBS. MARTIN *v.* HARDING - - - **Joyce J. 465**

11. —— *Vesting Gift to Son at Thirty-five—Discretionary Trust for Maintenance out of Income—Will—Construction.*

A testator gave all his residuary estate to trustees upon trust as to one-third part thereof to pay the income, or such part thereof as his trustees should think fit, to his son W. for his advancement, preferment, or benefit by equal weekly instalments until he should attain thirty-five, and then to pay him the corpus :—

Held, that the son took a vested interest at the testator's death and was entitled to immediate payment.

The rule laid down by Jessel M.R. in *In re Parker*, (1880) 16 Ch. D. 44, followed. *In re* WILLIAMS. WILLIAMS *v.* WILLIAMS
Neville J. 180

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